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89-1304

Supreme Court, U.S.

FILED

JUN 7 1989

JOSEPH F. SPANIOLO, JR.
CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1989

STEVEN WICKERSHAM,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE INDIANA COURT OF APPEALS

*

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Attorney for Petitioner

7312

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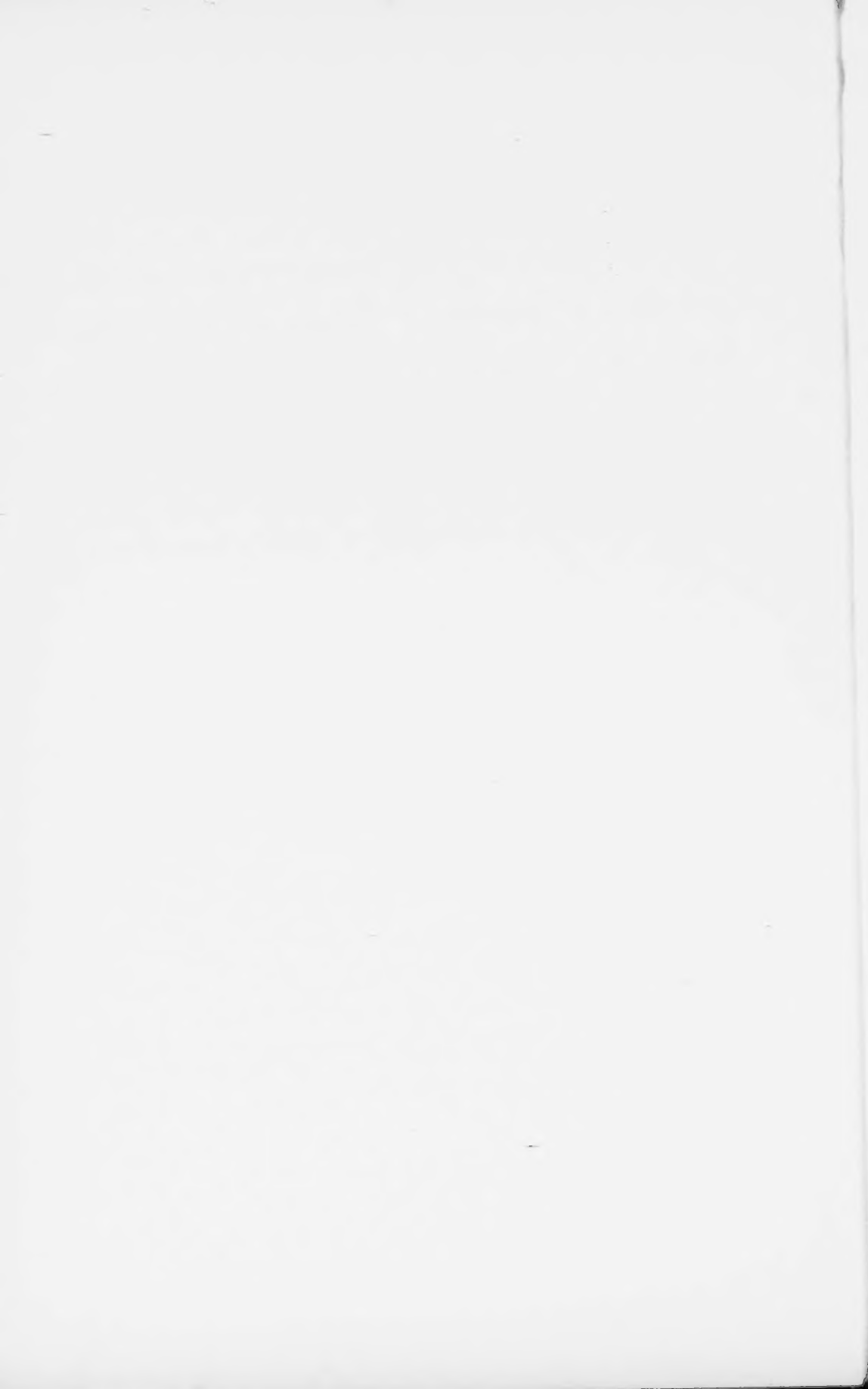
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QUESTION PRESENTED FOR REVIEW

Whether a law enforcement officer can prevent a person from entering his own home when the officer has no arrest warrant and no charges to obtain a warrant and, then, arrest the individual for resisting law enforcement because of the attempt to enter his own home.



LIST OF PARTIES

The parties below are:

(1) Steven Wickersham, Petitioner herein,
and the Defendant below and

(2) the State of Indiana, Respondent herein
is the Plaintiff below and is being served a
copy of the Petition for Writ of Certiorari
through the Attorney General of the State of
Indiana.



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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner, Steven Wickersham, by counsel respectfully prays this Court to issue a Writ of Certiorari to review the judgment of the Indiana Supreme Court entered in cause number 08A02-8611-CR-00418 on the 2nd day of December, 1988, which upheld the judgments of the Indiana Court of Appeals, Second District, and the County Court Division of the Carroll Circuit Court, in Delphi, Indiana.

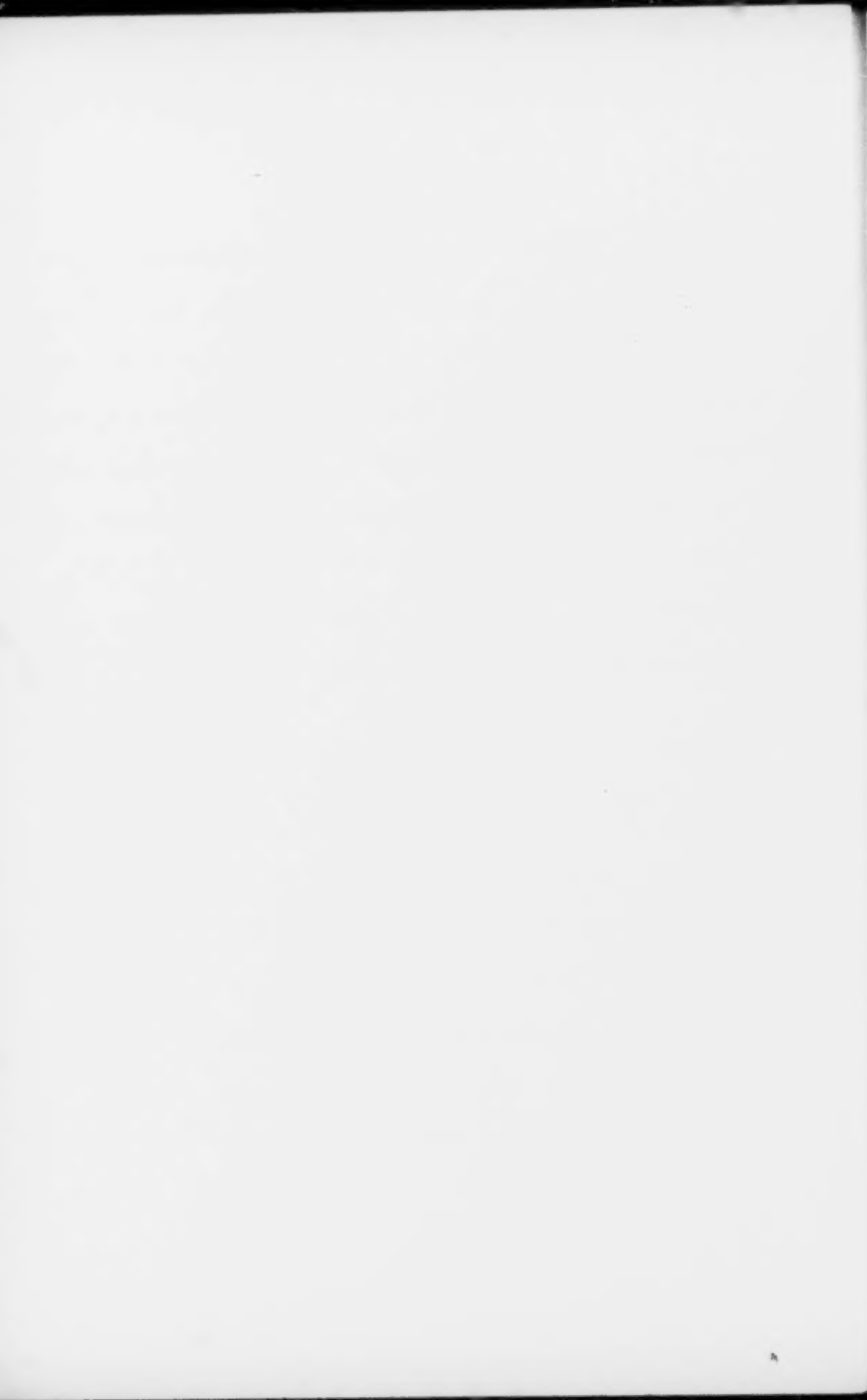


OPINIONS BELOW

The Order of the Indiana Supreme Court dated December 2, 1988, has not been officially reported. A copy of this Order is appended hereto at page A-1. The Memorandum Decision of the Indiana Court of Appeals and the Order of that court denying rehearing dated June 16, 1988, and December 2, 1988, respectively, are not officially reported and are appended hereto at pages A-2 and A-3.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257 and Rule 17 of the Rules of this Court to review a criminal conviction which has been appealed to the highest court in a state, in this case the Indiana Supreme Court.



The decision of the Indiana Supreme Court was entered on the 2nd day of December, 1988. Counsel for Petitioner attempted to secure an extension of time to file the Petition for Writ of Certiorari but was informed that no extension of time would be ruled on but that she could file her Petition for Writ of Certiorari after the deadline.

Counsel was unable to file her Petition for Writ of Certiorari before now inasmuch as she was not admitted to practice in this Court. Counsel resides in a rural and remote area of the country where few practitioners are admitted to practice before this Court. Counsel located one attorney admitted in this Court but was unable until June 2, 1989, to locate a second practitioner who was admitted to practice before this Court and who was sufficiently familiar with her to recommend her for admission to the bar of this Court. Alternatively, counsel sought an attorney



willing to file the Petition for Writ of Certiorari on Petitioner, Steven Wickersham's behalf but was unable to do so.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The following Amendments to the Constitution of the United States provide in relevant part as follows:

First Amendment

Congress shall make no law...abridging the freedom of speech...

Fourth Amendment

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are



citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

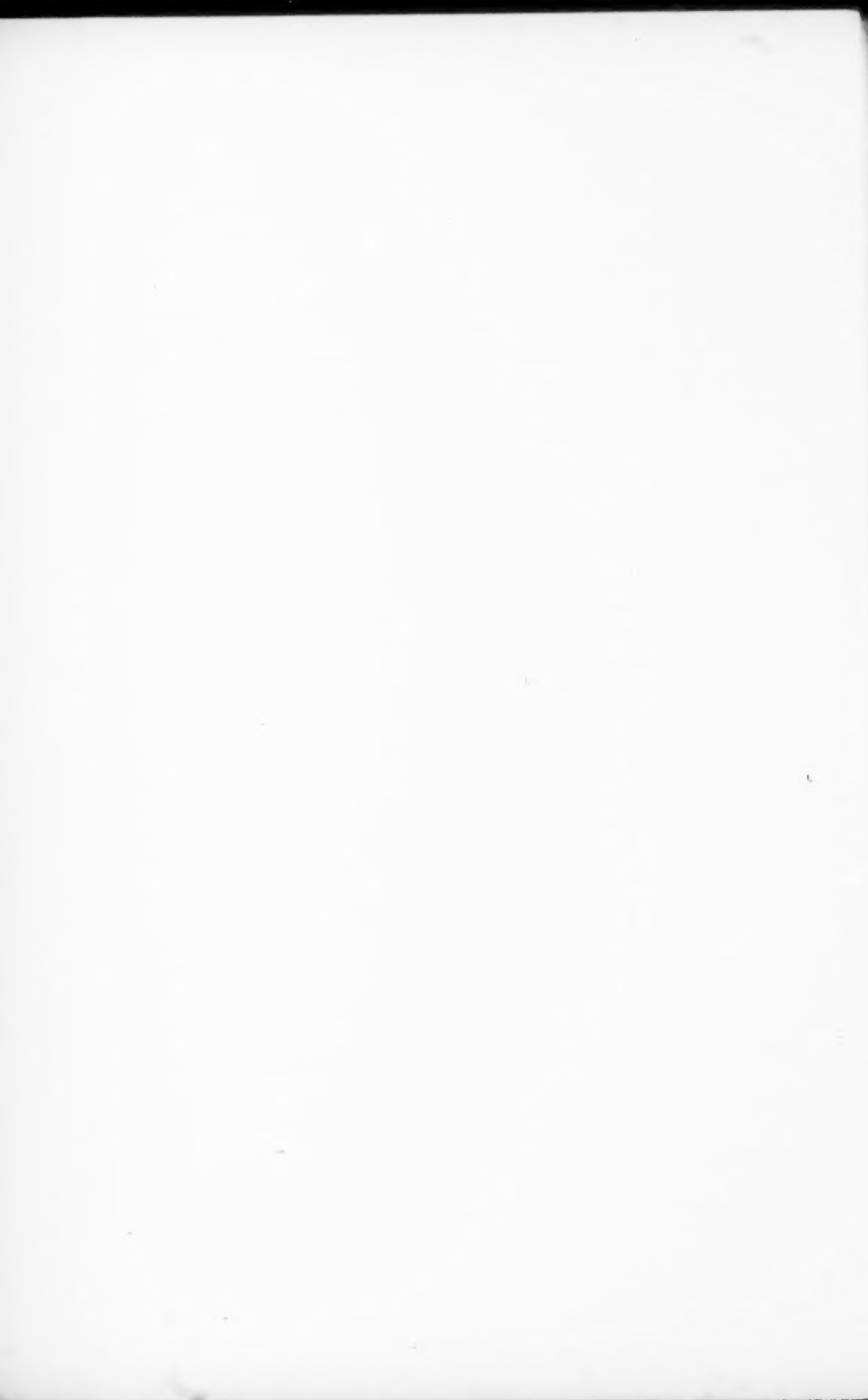
Indiana Code Section 35-44-3-3 provides in relevant part as follows:

Resisting law enforcement - A person who knowingly or intentionally forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of his duties as an officer.

Commits...a class A misdemeanor.

STATEMENT OF THE CASE

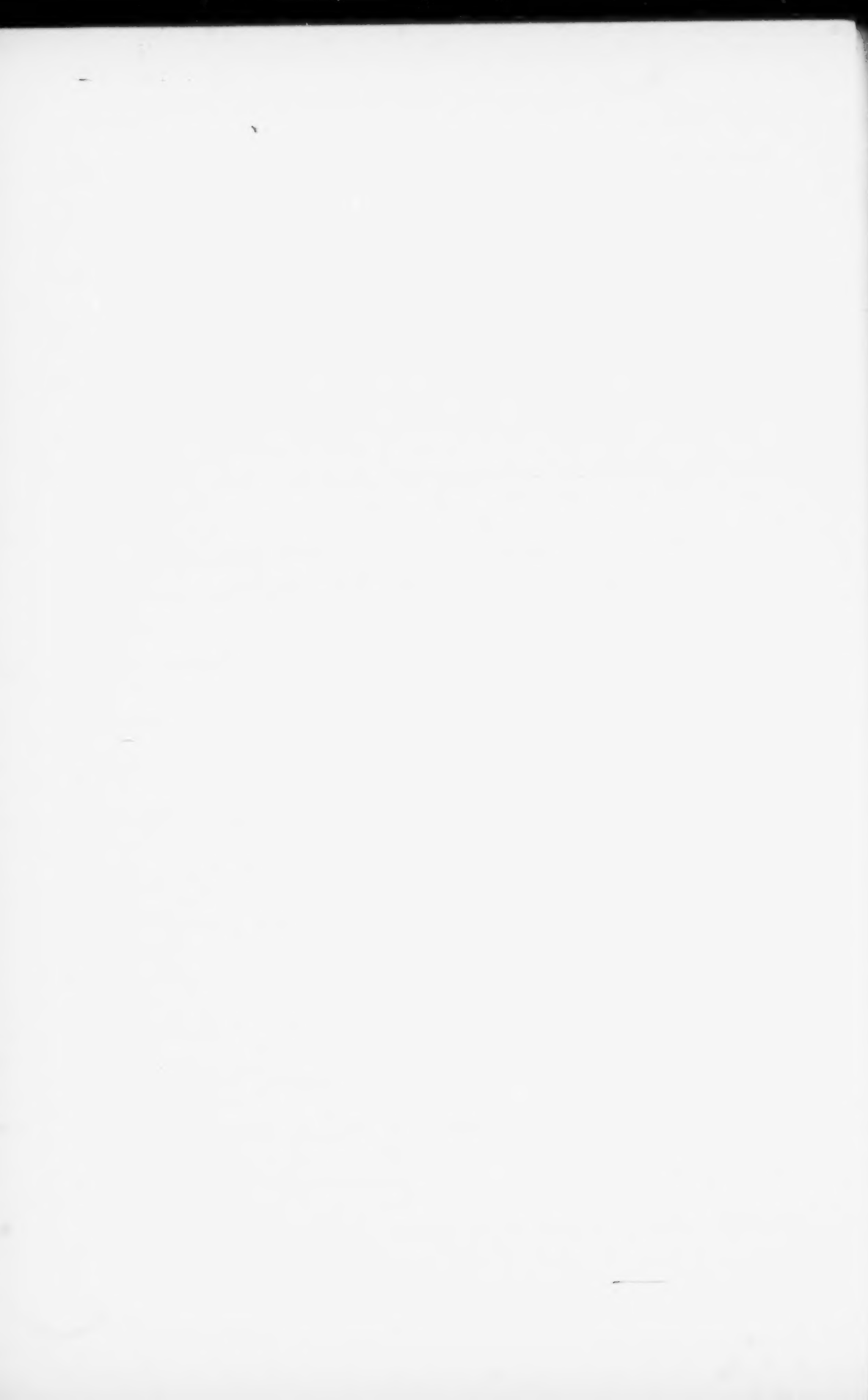
Steven Wickersham was convicted of resisting arrest (law enforcement) in the County Court Division of the Carroll Circuit Court. This conviction was upheld in a Memorandum Decision in the Indiana Court of



Appeals and a rehearing in that court was denied. A Petition to Transfer this case to the Indiana Supreme Court was filed but the Court declined to hear the case. This Petition for Writ of Certiorari arises out of Mr. Wickersham's conviction for resisting arrest and his subsequent appeal.

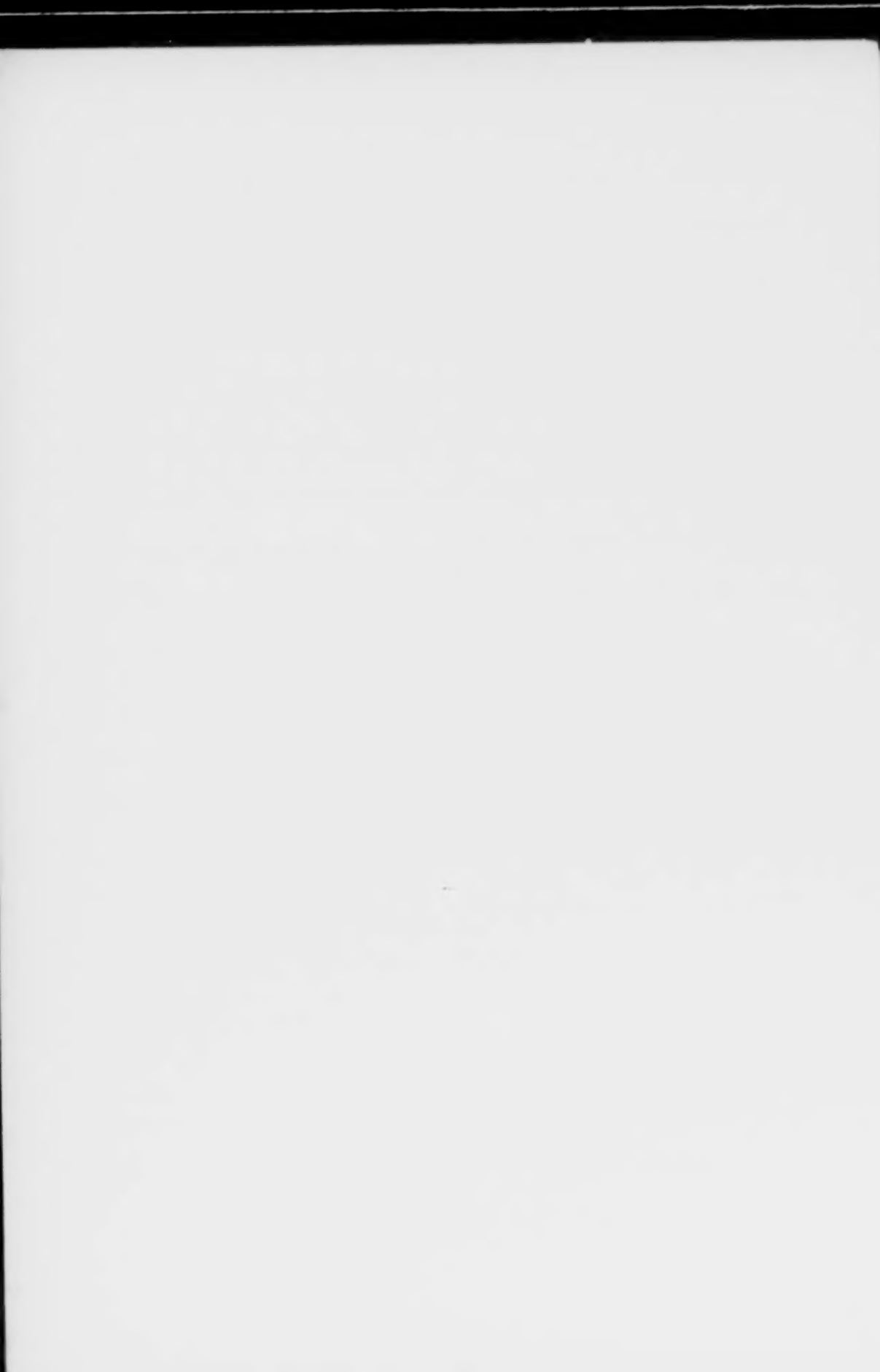
FACTS MATERIAL TO THE CONSIDERATION
OF THE QUESTION PRESENTED

Steve Wickersham arrived home after picking up his son in the neighboring town of Flora, Indiana. The Wickershams live several miles outside of town in a rural and somewhat secluded area. As they approached their driveway both Shawn and Steve Wickersham observed two police cars in the straight driveway of their home. Mr. Wickersham pulled into the circular driveway directly in front of and closer to his home than the straight driveway in a position which did not block the police officers. Three police



officers were present, Officers Kohne, Kessler and Bluemke. None of the three officers prevented Wickersham from turning off the public road into his private property and into his private driveway.

At the trial and during hearings of this matter the officers admitted that at the time Mr. Wickersham entered his property they had no warrant for his arrest. Officer Kohne also admitted that he had "no charges to obtain a warrant." The sole reason for the officers presence was a request by Steve Wickersham's wife, Barbara Wickersham, to accompany her to the house to obtain some personal belongings. At the suggestion of these law enforcement officers Barbara had decided to leave the house for a few days because her husband had learned of her infidelity and the couple had had an argument over this issue. Barbara did not ask the police to arrest her husband. Their presence

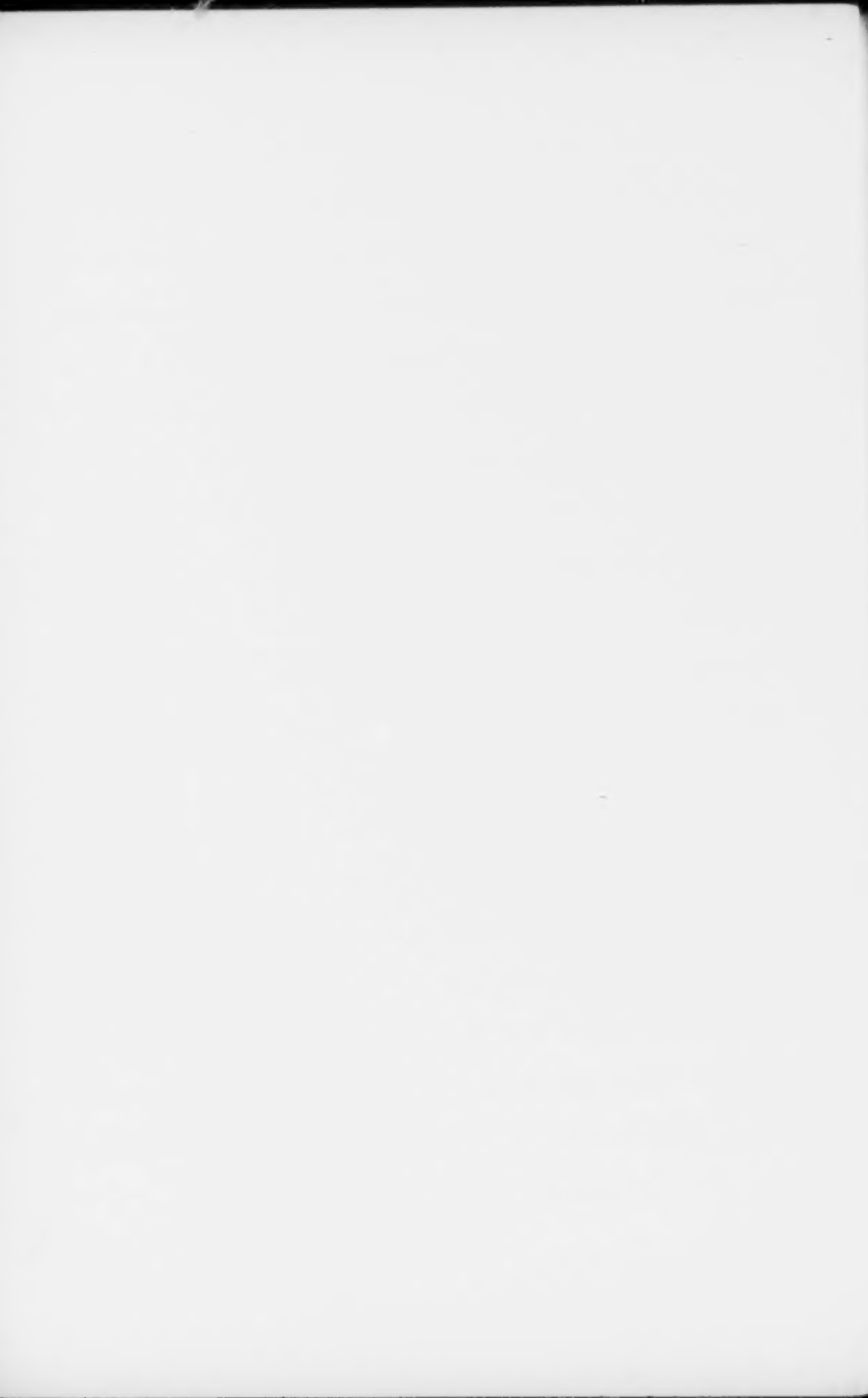


was merely a precaution to assist her in removing some of her belongings from the house. When Mr. Wickersham arrived home with his son, Barbara was inside the home and the three police officers were outside.

After Mr. Wickersham pulled in the circular driveway he exited the vehicle and removed his son's bicycle from the rear of the vehicle. Intending to enter the house to watch a football game with his son, Mr. Wickersham started walking on his lawn up to the front door of his house. He did not interfere or even talk to the police officers who were standing in the other driveway by the side of his house. As he walked to the door, officer Kohne ran over in front of Mr. Wickersham and insisted that he talk to him. Wickersham stated "If you want to arrest me fine, but just don't give me any of your shit." Officer Kohne told Wickersham that he had to talk to him and Wickersham said, "No,



I'm going into the house." He again stated that if he wanted to arrest him to do so. At that point Wickersham attempted to walk past Kohne and into the house but Kohne took a hold of him and attempted to get him to the ground. A scuffle ensued and Wickersham was placed under arrest for battery on a police officer and resisting arrest. Wickersham was found not guilty of the battery on a police officer and guilty of resisting arrest. During the trial the judge refused to instruct the jury that individuals have a right to talk to or question police. He also refused to instruct the jury that law enforcement may not create exigent or other circumstances to justify an arrest. Wickersham filed a Motion to suppress alleging that he had been illegally seized within the meaning of the Fourth Amendment when Officer Kohne stopped him insisting that he talk, blocked his entry to his home,



forced him to the ground and handcuffed him. Wickersham asked that all evidence (i.e. statements and observations) after his initial detention or seizure be suppressed as a product or fruit of the illegal seizure.

REASONS FOR ALLOWANCE OF THE WRIT

WHETHER A LAW ENFORCEMENT OFFICER CAN PREVENT A PERSON FROM ENTERING HIS OWN HOME WHEN THE OFFICER HAS NO ARREST WARRANT AND NO CHARGES TO OBTAIN A WARRANT AND, THEN, ARREST THE INDIVIDUAL FOR RESISTING LAW ENFORCEMENT BECAUSE OF THE ATTEMPT TO ENTER HIS OWN HOME.

At common law an individual was permitted to resist an unlawful arrest. Casselman v. State (1985), 3rd Dist. Ind.App., 472 N.E.2d 1310.

Indiana has not wholly abrogated this right but has limited it to the right to resist unlawful arrests in the home or to circumstances where the officer uses

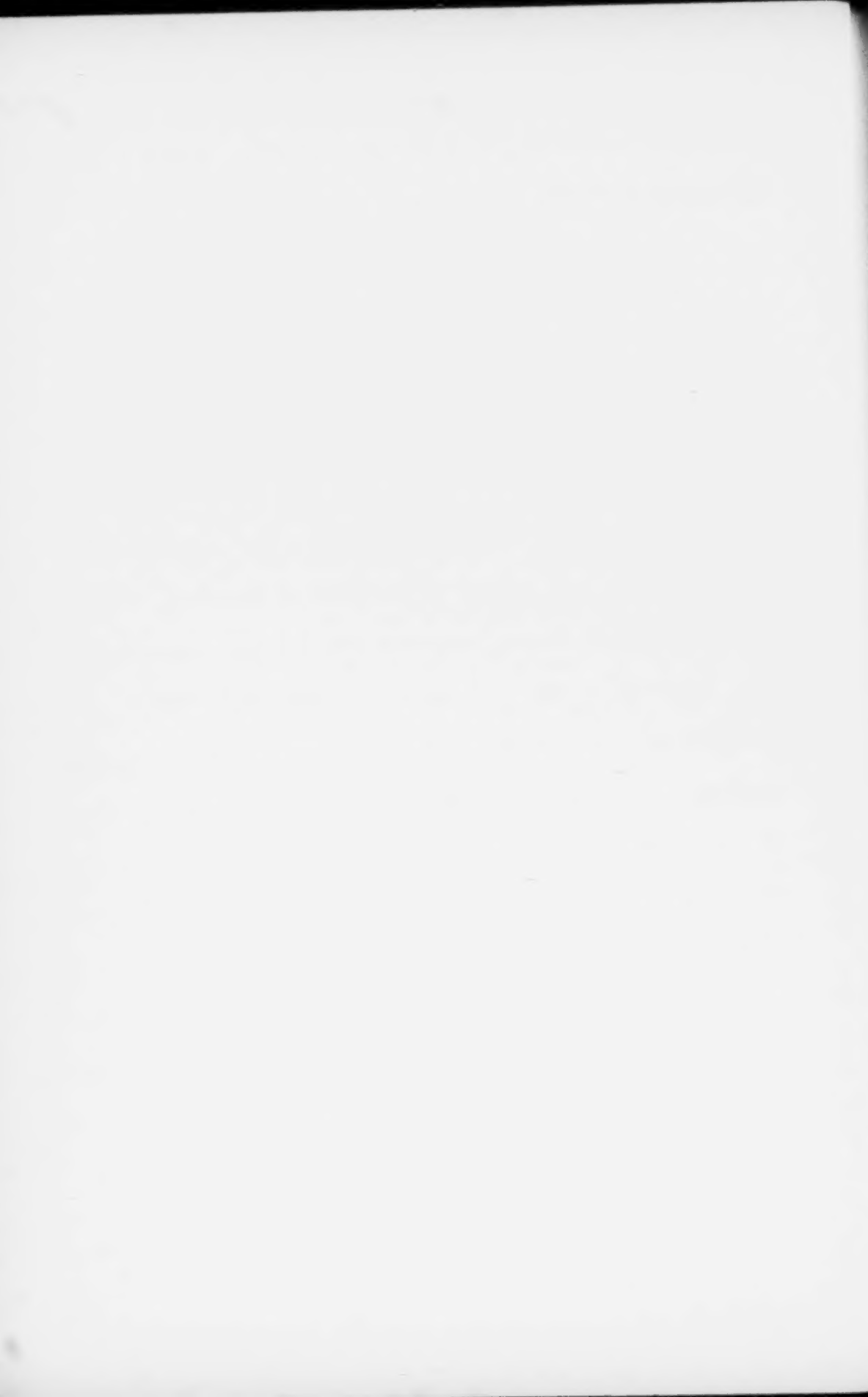


excessive force. Id. at 1315, 1316. The Casselman court remarked that:

"a citizen might rightfully resist the use of excessive force by one attempting to make an arrest. We think this exception exists and that it applies, at least by analogy, where the arrest is attempted by means of a forceful and unlawful entry into a citizen's home. In the eyes of the law such an entry represents the use of excessive force."

472 N.E.2d at 1316. The Court further noted that Indiana case law has abrogated the right to resist an unlawful arrest only in peaceable arrests which occur in public places. (emphasis added) Id. 472 at 1315, 1317. Indiana courts have reasoned that it is "outmoded in our modern society" to advocate resistance with reasonable force. Id. 472 N.E.2d at 1315 (quoting Fields v. State (1978), 178 Ind.App. 350, 382 N.E.2d 972, 975).

The modern approach requires the individual to suffer the unlawful arrest if



it is peaceable and in a public place and to seek relief in the civil courts. However, in the absence of peacefulness the justification for requiring submission is gone and

"[i]n the absence of a criminal arrest warrant, an arrest cannot be considered peaceful when it is accomplished by forcibly preventing a person from closing the door or by entering the house without permission."

(emphasis added) Casselman, 472 N.E.2d at 1317. Casselman recognized the "sharp distinction" between the intrusiveness of arrests in the street and arrests in the home. Id. 472 N.E.2d at 1317 (citing Payton v. New York (1980), 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639), also noting that the primary evil the Fourth Amendment seeks to avoid is an entry of the home, Id. (citing United States v. United States District Court (1972), 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752). The Court further remarked that Payton stands for a

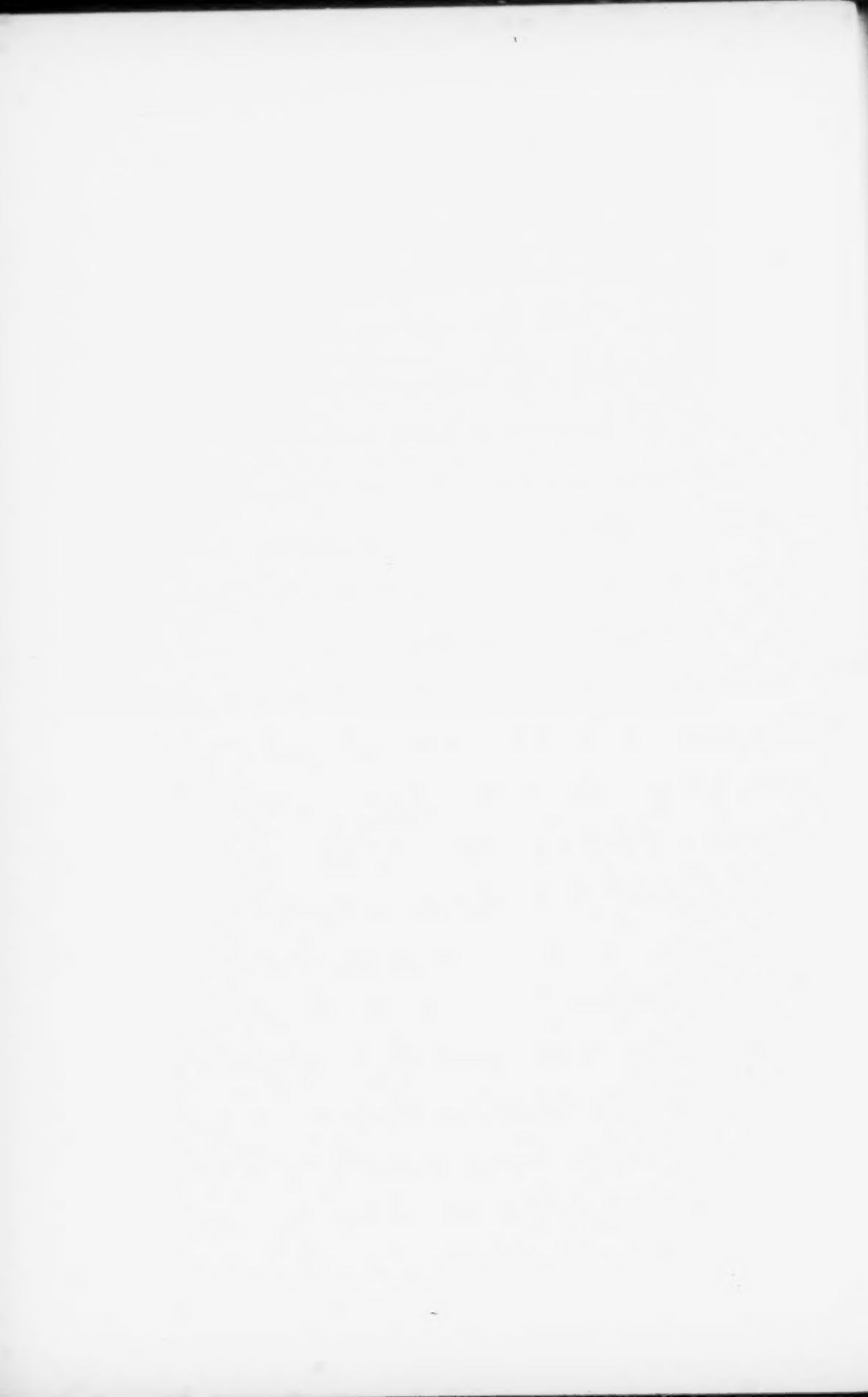


"continuing vitality of that expectation of privacy in the home which underlies the common law right, because the more patently unlawful the intrusion, the more excusable the resistance becomes."

Casselman, 472 N.E.2d at 1317. Casselman distinguishes the right to resist an unlawful arrest in private places from those in public places and refers to the home as a private place. Essentially, Casselman recognizes that a man's home is his castle.

Although Indiana has previously recognized that not only a home but also the grounds directly outside the residence (including the front yard) are not public places, State v. Culp (1982), Ind.App., 433 N.E.2d 823, 825; State v. Sowers (1876), 52 Ind. 311, neither Casselman nor other case law addresses resistance of an unlawful arrest in the curtilage grounds deemed private places under Indiana law.

When Steve Wickersham was driving on the public road with his son he was in a public



place. When he drove onto his property (past the police cars into a circular driveway directly outside of and in front of his residence) he was on private property in a private place. He exited the vehicle in his front yard, got his son's bicycle out of the vehicle and started toward the house. Mr. Wickersham was permitted to exit the public street and enter his private property without being stopped or otherwise detained by police.

It is undisputed that Steve Wickersham was not under arrest when he left the public highway and entered his private property. Officer Kohne admits that he had no warrant and no charges to obtain a warrant on Mr. Wickersham. Officer Kohne further states that he insisted that Mr. Wickersham talk to him, that Mr. Wickersham had to talk to him, and that he was not going to let Mr. Wickersham enter his own home.

The question then becomes whether officer Kohne acted lawfully in preventing Mr. Wickersham from entering his own home and whether he could lawfully force Mr. Wickersham to talk with him. Mr. Wickersham contends that he was unlawfully seized by Officer Kohne within the meaning of the Fourth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment. Officer Kohne had no warrant and admittedly no charges to procure a warrant when Mr. Wickersham drove into his driveway. Since it is admitted that Mr. Wickersham had committed no crime and was not subject to arrest while on the highway or any public place a review of his actions after he entered the grounds to his private residence must be undertaken. The focus thus shifts to an analysis of what, if any, crimes Steve Wickersham committed after he exited his parked vehicle and walked on his own



residential grounds (a private place). It is submitted that none occurred and that Mr. Wickersham's seizure was unlawful and in violation of the Fourth and Fourteenth Amendments to the United States Constitutions.

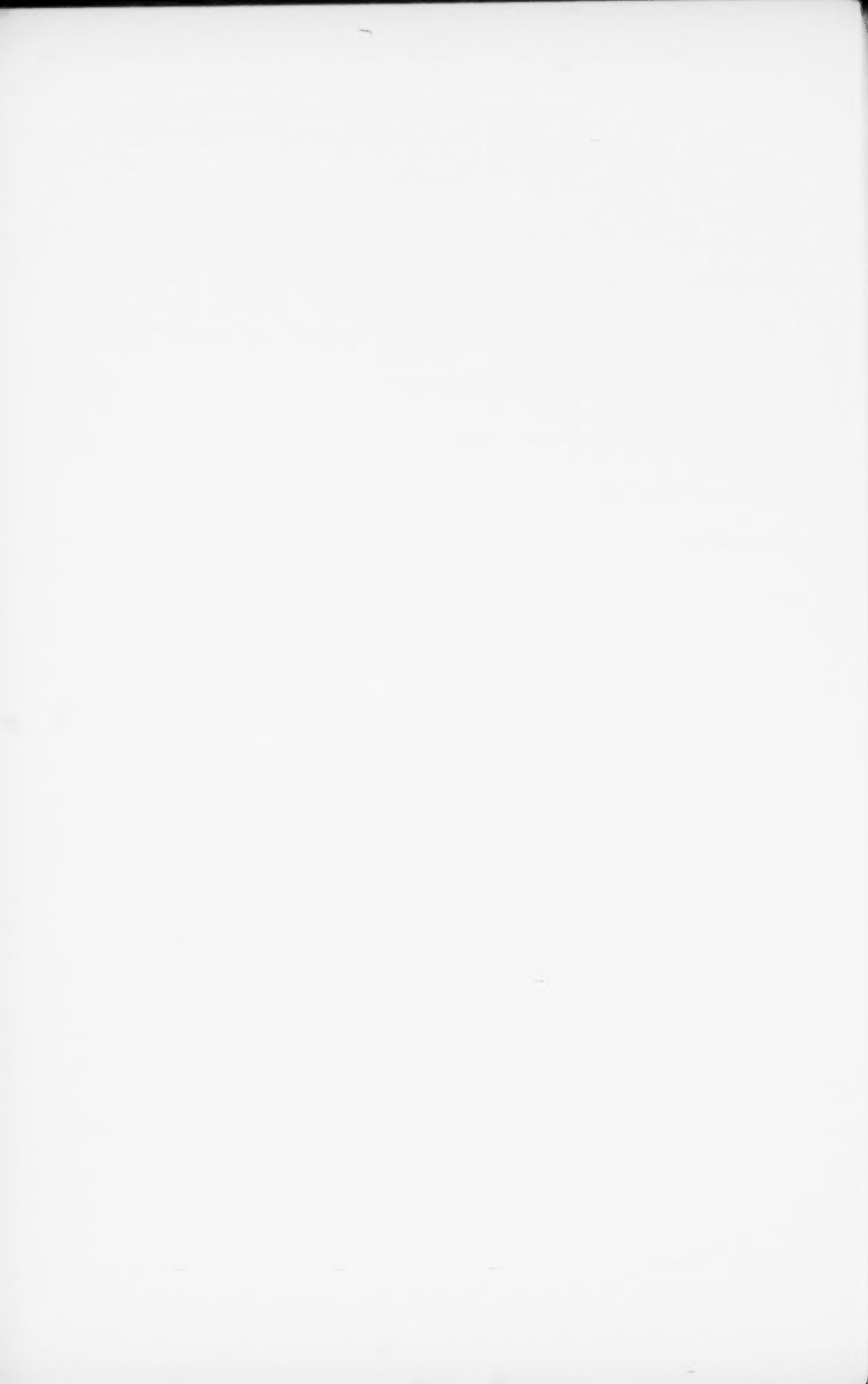
At the time he got out of his vehicle Steve Wickersham was, with his son, intending to enter his residence to watch a football game. Mr. Wickersham was a current owner and occupier of the house and, was not a party to a dissolution or subject to any restraining order. The three police officers were outside of his residence in the driveway nearest the public road. Mr. Wickersham had almost immediate access to the doorway of his residence since he was parked closer to his house than the officers who were in the other driveway.

Officer Kohne admits that Mr. Wickersham was not under arrest at the time he exited



his vehicle and started toward his residence. Officer Kohne states that Mr. Wickersham was only under arrest because he refused to talk with him and because he attempted to enter his home. The refusal to talk must be examined in light of Bovey v. City of Lafayette (N.D. Ind. 1984), 586 F.Supp. 1460 and Hess v. State (1973), 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303, which reversed an Indiana State Court decision. In Hess the United States Supreme Court held that a statute which criminalized speech was unconstitutional if that speech fell short of fighting words or words likely to incite imminent lawlessness. Bovey, 586 F.Supp. at 1467. In Bovey, the Court noted that a citizen has a right to question a police officer regarding his reasons for stopping him or to make a statement to him. 586 F.Supp. at 1468. The Court also noted that the limitations on this right of free speech

(to address a police officer) are narrowly proscribed. Id. Bovey's statements "Don't talk to my wife in that tone of voice!," "I couldn't have been going that fast," "What are you accusing me of?" and "I am a lawyer and I know my rights" were found to be protected speech under the First Amendment to the United States Constitution and not subject to punishment under Indiana's disorderly conduct statute. Similarly, in Cavazos v. State (1983), Ind.App., 455 N.E.2d 618, a conviction for disorderly conduct predicated on the defendant's statement to the officer that he was an "asshole" was reversed and held not to be punishable as obscenity or nuisance speech or as speech that would incite imminent lawlessness. Id., 455 N.E.2d at 620 - 621. See also Miller v. State (1972), 258 Ind. 79, 279 N.E.2d 222 (telling a state trooper in a courtroom "[t]his is nothing but a damn farce...It's



nothing but a goddamn kangaroo court...Hell, I'm not apologizing to anybody" was held protected speech and not punishable as disorderly conduct). In light of Hess and its progeny, Mr. Wickersham's statements to the police "If you want to arrest me fine but don't give me any of your shit" and "no, I'm going into the house" are protected speech under the First Amendment to the United States Constitution. Officer Kohne admits that this purported violation of the disorderly conduct was the reason for Mr. Wickersham's arrest and that only after that time did the resisting arrest violation occur. It is significant that Mr. Wickersham was never charged with disorderly conduct but with resisting arrest and battery on a police officer, and that he was found not guilty of the battery. Officer Kohne, after some questioning, admitted that there was no exigency in arresting Steve Wickersham.

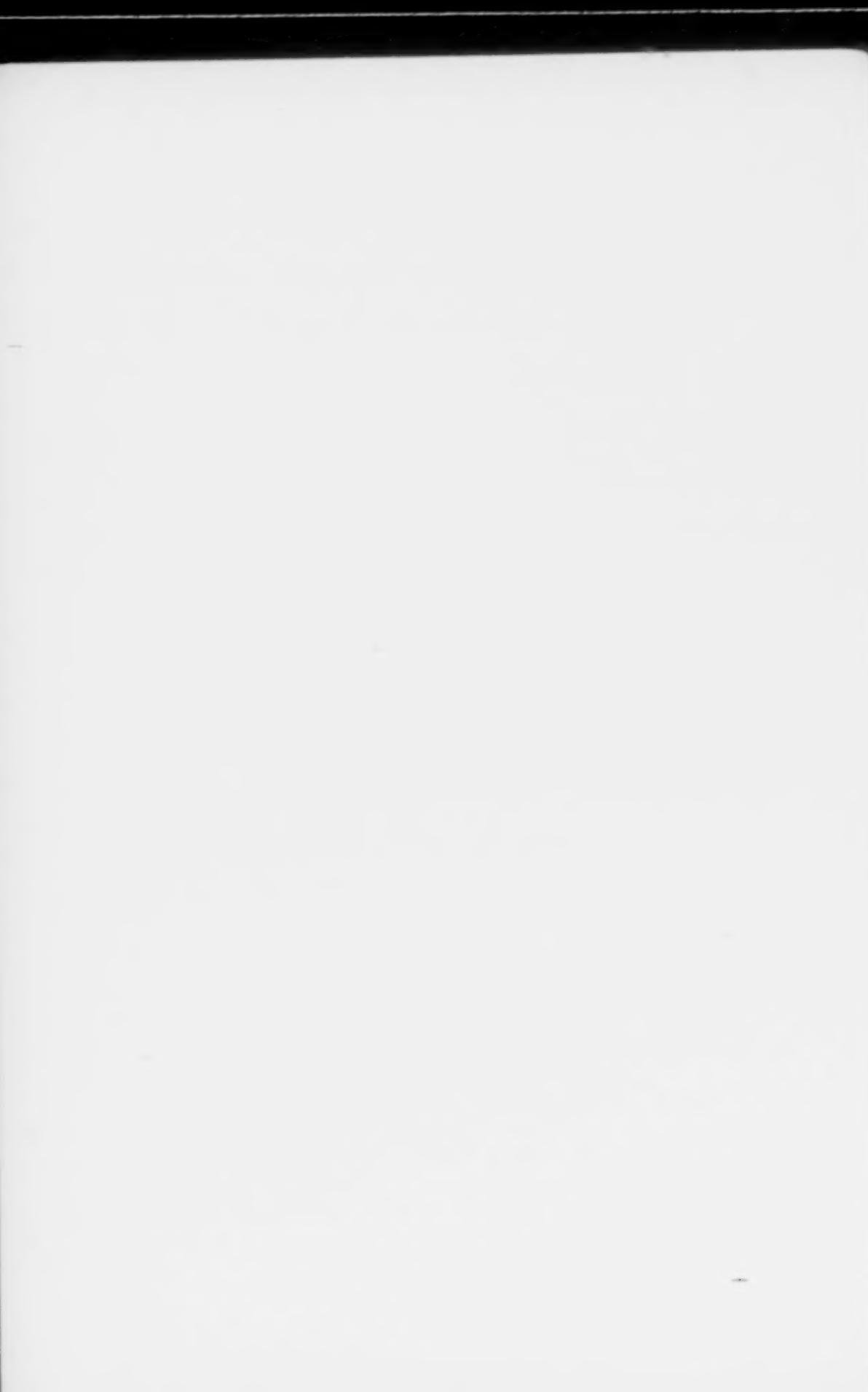


Moreover, this is not a case where a crime is committed by an individual on public property and the police follow that person onto his private property or into his home to complete an arrest already set in motion in a public place. See e.g. U.S. v. Santana, (1976) 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300. In Santana and its progeny a crime is committed in a public place and an attempt is made to escape to a private place and to secrete oneself or evidence from the police. In this instance there was no crime committed in any public place which was observed by the officer and Wickersham committed no crime when he drove onto the grounds of his private residence. The only arguable violation officer Kohne mentions as justification for Mr. Wickersham's arrest or detention is a purported disorderly conduct violation based on Mr. Wickersham's statement, "If you want to arrest me, fine but don't give me any of



your shit." This argument seems specious in light of the fact that Officer Kohne admits that he was not going to allow Mr. Wickersham to enter his own house regardless of any alleged violation.

The final question that arises is a determination of when Mr. Wickersham was "seized" within the meaning of the Fourth Amendment. Clearly, Mr. Wickersham was not "seized" when he drove on the public highway unencumbered. Similarly, he was permitted to drive past police vehicles onto his property and park his vehicle next to his residence without restriction. He was further permitted to exit his vehicle and remove his son's bicycle from the vehicle. It was only after Mr. Wickersham had walked near the front door and attempted to enter his residence that his freedom was restricted. Therefore, he was not "seized" in a public place but in a private place. The police did



not block the driveway to his home (entrances from the public thoroughfare) or otherwise attempt to prevent Mr. Wickersham from driving onto his property. Mr. Wickersham submits that he was "seized" when officer Kohne placed himself in front of Wickersham, demanded that Wickersham talk, blocked Wickersham's entrance to his own home and refused to allow Wickersham to move. Almost simultaneously Officer Kohne got a hold of Wickersham, forced him to the ground scuffled and handcuffed him. Officer Kohne sparked these events and those occasions immediately after that and Mr. Wickersham was arrested as a result of those events. Therefore, the conduct resulting in criminal charges was a direct product of Officer Kohne's wrongful seizure and should have been suppressed. The State Court rulings contravene the Fourth Amendment to the United States Constitution



(as applied to the States through the Fourteenth Amendment) and should be subject to reversal.

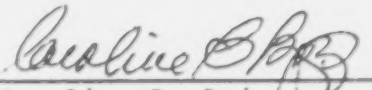
CONCLUSION

Steve Wickersham requests the Supreme Court to accept his Petition for Writ of Certiorari because of the need for a resolution of what is a recurring issue in criminal law enforcement. Law enforcement need standards for determining the extent of permissible conduct for actions occurring in the curtilage of the home. This Court is requested to resolve whether a police officer may arrest an individual for resisting arrest when that individual attempts to enter his own residence and when that officer has no warrant and no charges to obtain a warrant and when the individual is on private property or in a private place. A noted

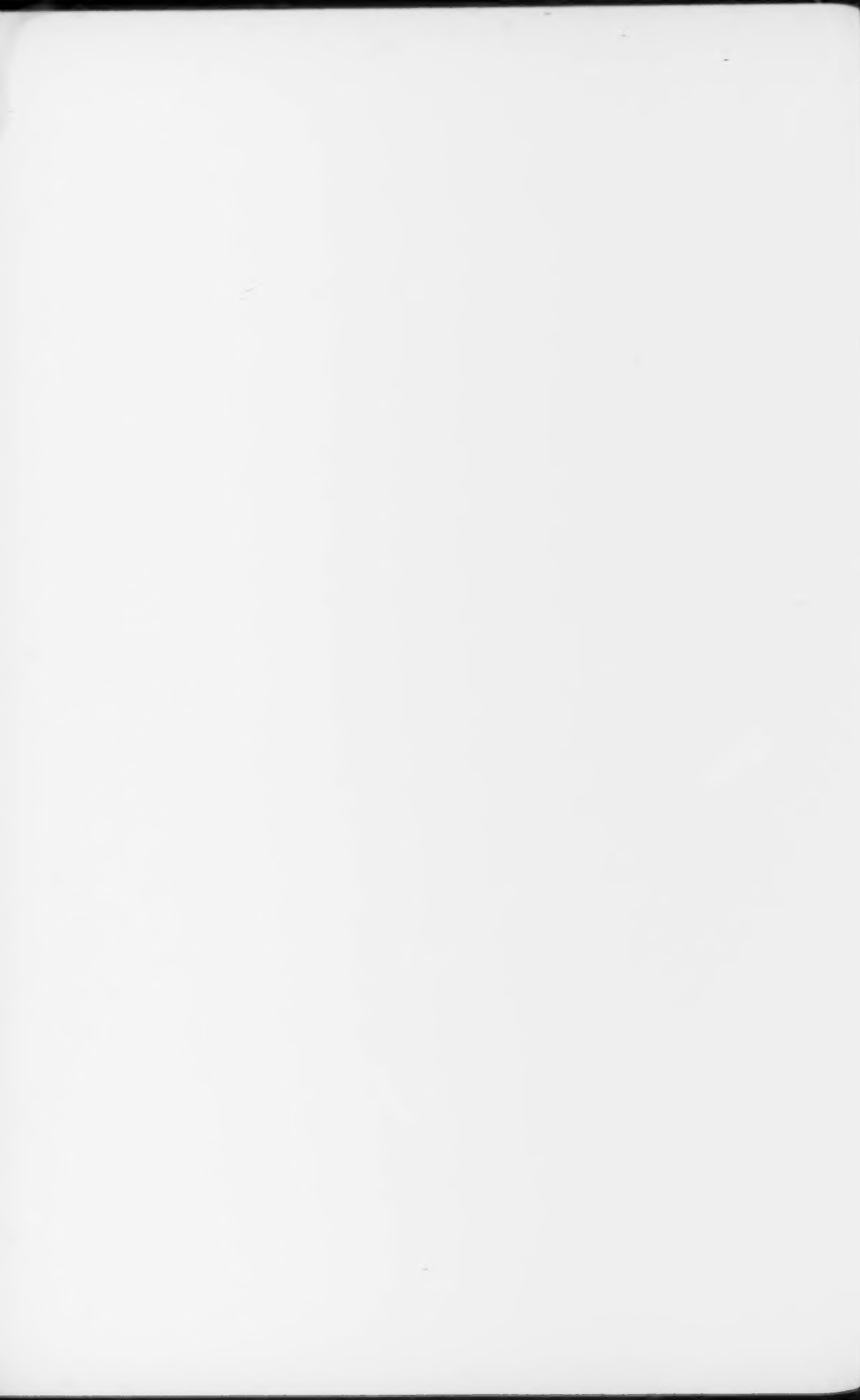


paucity of case law in this area exists on
this issue. Mr. Wickersham urges the Court
to accept his Petition for Writ of
Certiorari.

Dated: June 2, 1989.



Caroline B. Briggs
Attorney for
Steve Wickersham
28 South Center Street
Flora, IN 46929
(219) 967-3631



CERTIFICATE OF SERVICE

I hereby certify that on this the 29th day of January, 1990, I did mail three (3) copies of the foregoing to Linley E. Pearson, Attorney General, State of Indiana, Room 219, State House, Indianapolis, IN 46204.

Caroline B. Briggs
Caroline B. Briggs

STATE OF INDIANA, COUNTY OF CARROLL, SS:

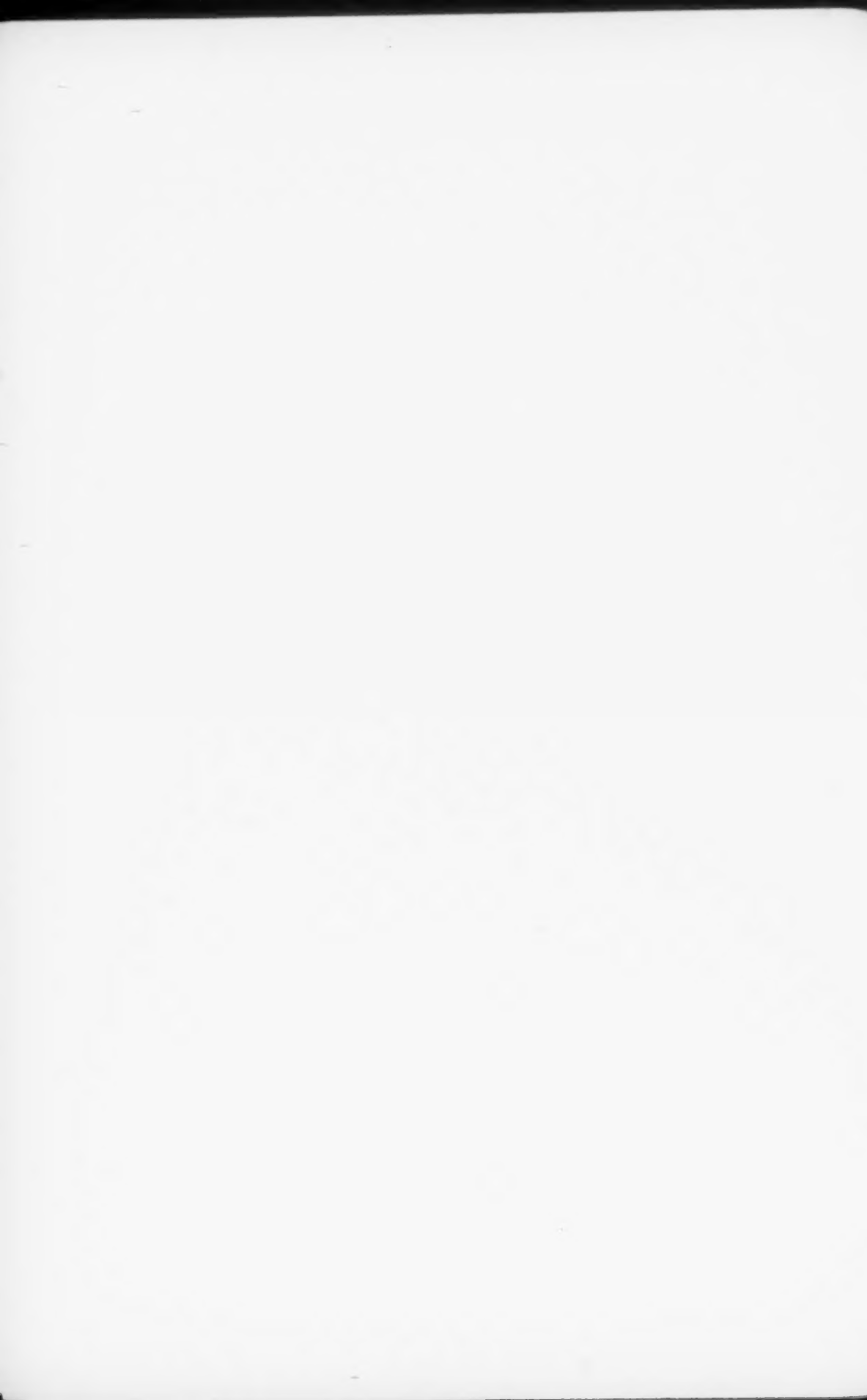
Subscribed and sworn to before me, a Notary Public in and for said County and State, by Caroline B. Briggs, on this the 29th day of January, 1989.



Shirley Wertz
Shirley Wertz
Notary Public

Resident of Carroll County
State of Indiana

My Commission Expires: January 15, 1994



No. _____

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October Term 1989

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v.

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APPENDIX

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APPENDIX

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STEVEN WICKERSHAM VS STATE OF INDIANA

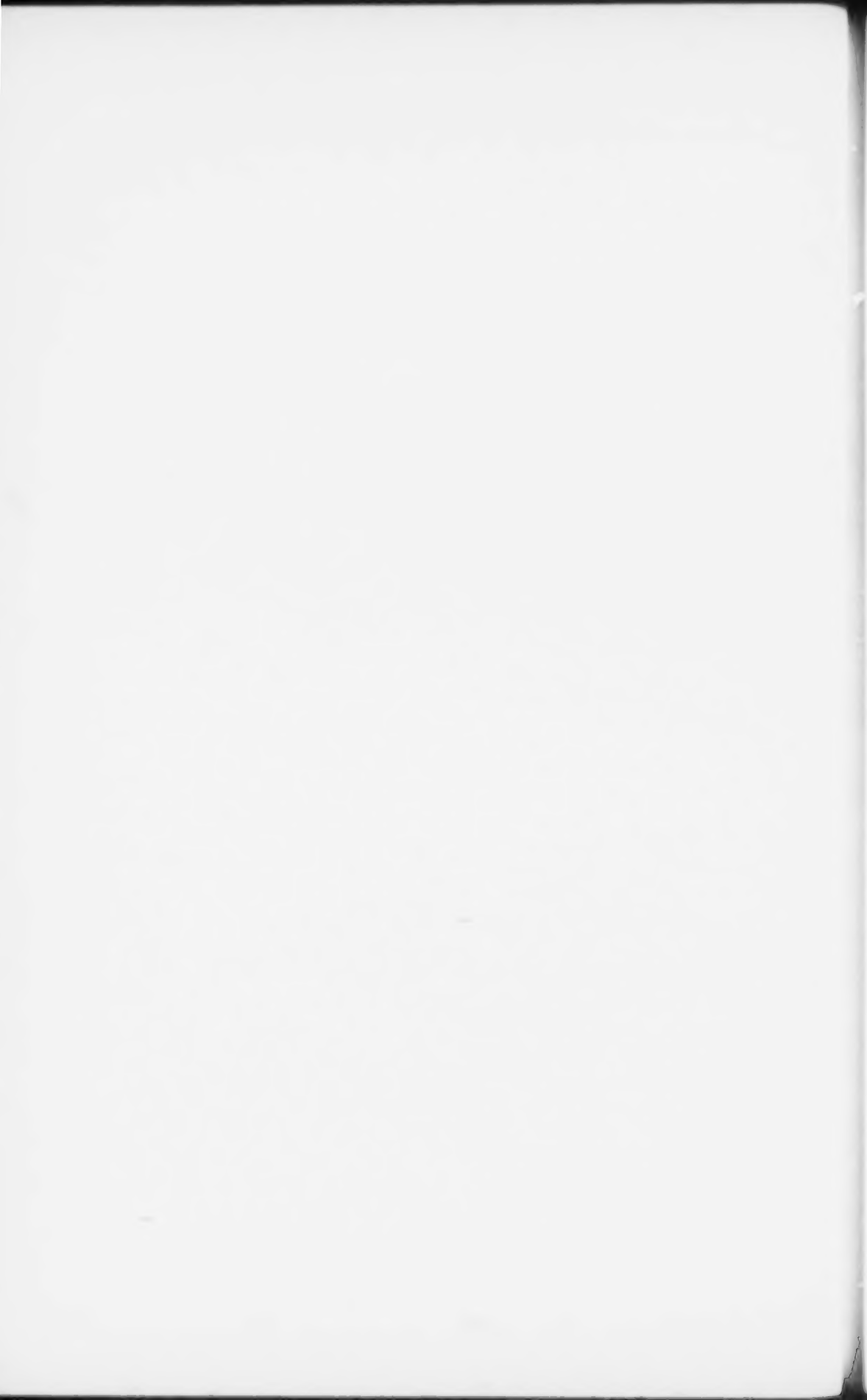
CAUSE NUMBER 08A02-8611-CR-00418

LOWER CAUSE CS-85-1050

You are hereby notified that the
SUPREME COURT has on this day 12/02/88
APPELLANT'S PETITION FOR TRANSFER IS
HEREBY DENIED, WITHOUT OPINION. RANDALL
T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR.

WITNESS my name and the seal of said
Court this 2nd day of December, 1988.

ss/Daniel Heiser
Clerk Supreme Court,
Court of Appeals and
Tax Court



STEVEN WICKERSHAM VS STATE OF INDIANA

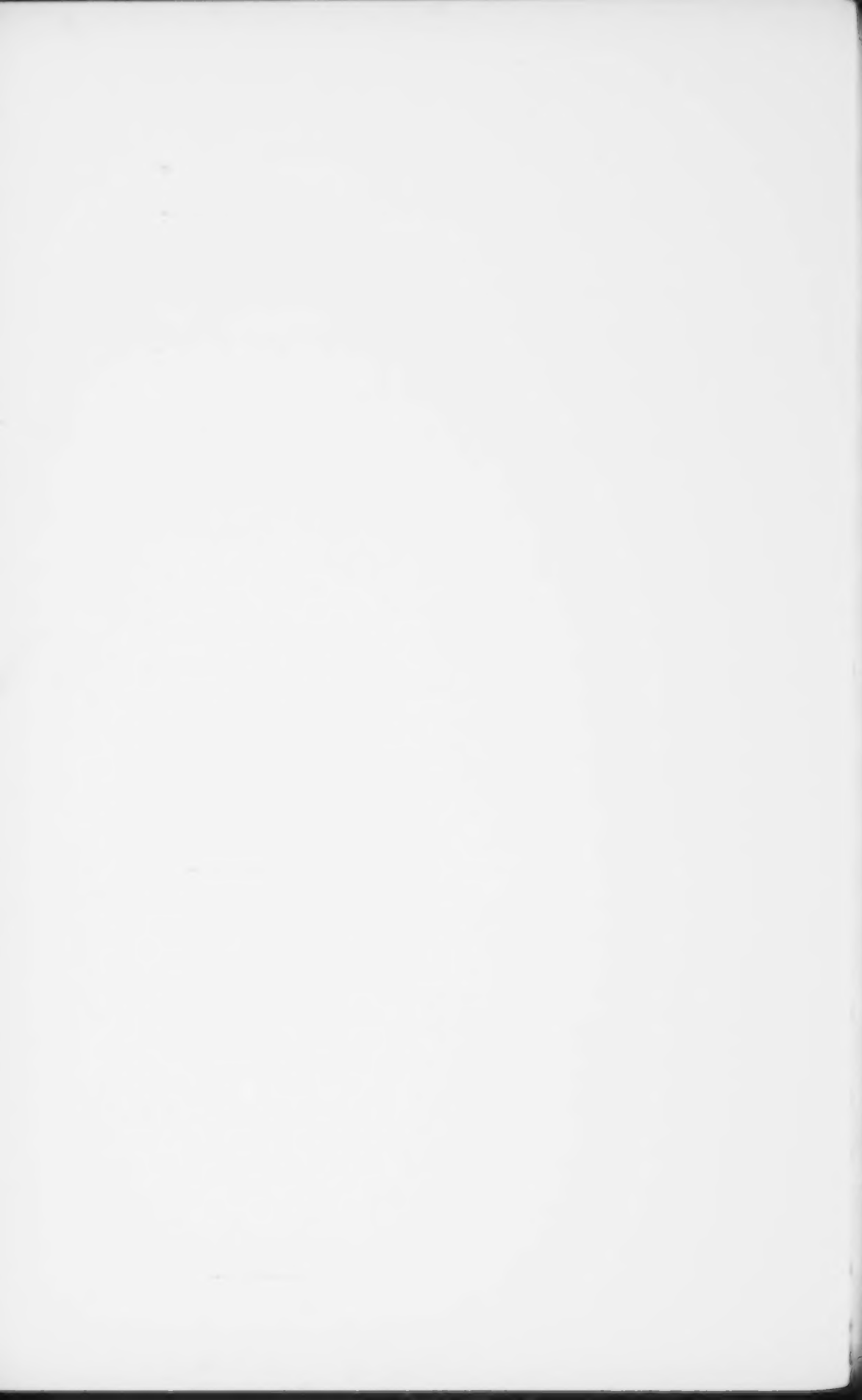
CAUSE NUMBER 08A02-8611-CR-00418

LOWER CAUSE CS-85-1050

You are hereby notified that the
COURT OF APPEALS has on this day 6/16/88
APPELLANT'S PETITION FOR REHEARING DENIED.
WESLEY W. RATLIFF, JR., CHIEF JUDGE.

WITNESS my name and the seal of said
Court, this 16th day of June, 1988.

ss/ Daniel Heiser
Clerk Supreme Court,
Court of Appeals and
Tax Court



IN THE
COURT OF APPEALS OF INDIANA
SECOND DISTRICT

STEVEN WICKERSHAM,

Appellant
(Defendant below),

v.

No. 08A02-8611-CR-418

STATE OF INDIANA,

Appellee.

APPEAL FROM THE
CARROLL COUNTY CIRCUIT COURT
The Honorable Donald R. Myers, Judge
Cause No. CS-85-1050

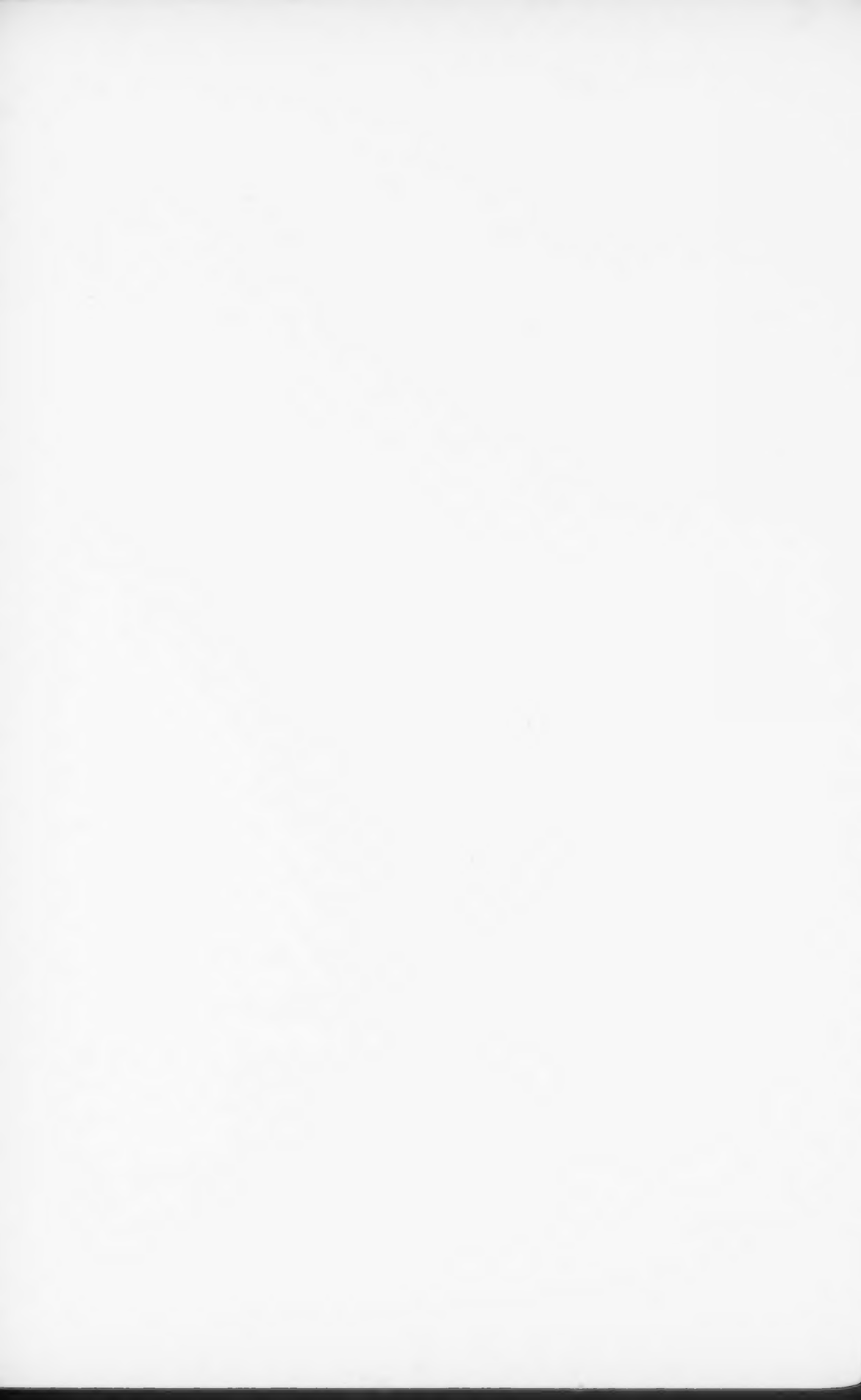
SULLIVAN, J.

MEMORANDUM DECISION

Appellant-defendant Steve Wickersham
(Wickersham) appeals his jury conviction
for resisting law enforcement.

We affirm.

Wickersham and his wife,
Barbara, had an argument in their home on



September 15, 1985. After verbal and physical confrontation, Wickersham told Barbara to leave. She went to Officer Kessler's home, asking him to escort her to her home so that she could pack some of her belongings. Officer Kessler called Officers Kohne and Bluemke to accompany them. Wickersham was absent when they arrived at the house. While the officers waited by their patrol cars for Barbara, Wickersham returned. Officer Kohne attempted to stop Wickersham as he approached the house but Wickersham tried to push his way past and refused to converse. With the assistance of the other officers, Officer Kohne was able to restrain Wickersham by handcuffs after pushing him to the ground.

Wickersham presents several issues on appeal. First, he contends that it was error for the trial court to dispose of notes taken by the jury. Whether or not



to allow the taking of notes by the jury is discretionary with the court. Marbley v. State (1984) Ind., 461 N.E.2d 1102; Gann v. State (1975) 263 Ind. 297, 330 N.E.2d 88; Miressso v. State (1975) 163 Ind.App. 231, 323 N.E.2d 249, trans. denied. The principal considerations in the exercise of the discretion are the relative complexity and the anticipated length of the trial. See Dudley v. State (1970) 255 Ind. 176, 262 N.E.2d 161.

Wickersham does not argue that the taking of notes was erroneous or prejudicial, nor do we discern any abuse of discretion in allowing such notes in this case despite the relative simplicity of the issues.

When the trial court exercised its discretion in destroying the notes, Wickersham contends that it deprived him of his statutory right to appeal by failing to keep a complete record for the

reviewing court. Emmons v. State (1986) Ind., 492 N.E.2d 303 (court refused to record voir dire). Without the jurors' notes, Wickersham asserts he cannot present errors which may have occurred through their misuse. Because this trial was neither complex nor long, the jurors most likely gave little importance to the notes during their deliberations. Even if the notes were part of the record, Wickersham could not use them to attack the jury's deliberations. Jurors' notes are their subjective evaluations of the evidence, no different than evaluations retained in their minds and shared with the other jurors. We conclude that there was no reversible error in the trial court's failure to retain the jurors' notes.

Next, Wickersham contends that it was error to convict him for resisting a law enforcement officer when Officer Kohne was

preventing him from entering his own home. He argues that the trial court erred by refusing to suppress testimony regarding his actions in his own front yard. A private residence and the grounds surrounding it are not a public place. State v. Culp (1982) 2d Dist. Ind.App., 433 N.E.2d 823, trans. denied; Cornell v. State (1980) 2d Dist. Ind.App., 398 N.E.2d 1333. There is authority to the effect that when an officer unlawfully enters such grounds, a private citizen may reasonably resist arrest. Casselman v. State (1985) 3d Dist. Ind.App., 472 N.E.2d 1310. The more established and perhaps better reasoned authority, however, would seem to discourage citizens from making a subjective judgment as to the validity of a police officer's authority. See City of Indianapolis v. Ervin (1980) 2d Dist. Ind.App., 405 N.E.2d 55; Fields v. State (1978) 1st Dist. 178 Ind.App. 350, 382

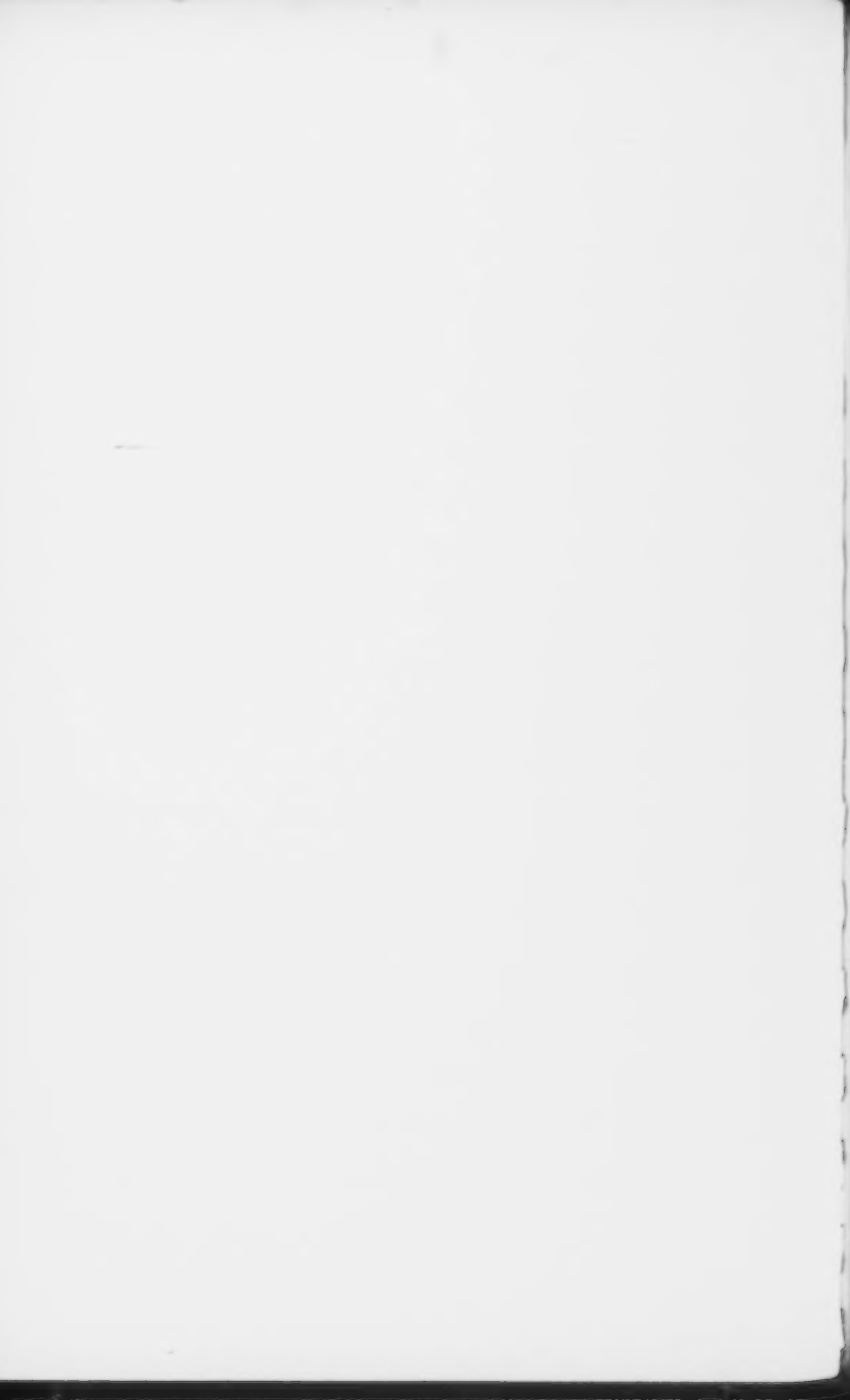


N.E.2d 972. In any event, in the case at issue the officers lawfully, at Barbara's request, entered the Wickershams' front yard. Barbara, as joint possessor of the property, had the power to consent to entry upon the property. Greer v. State (1970) 253 Ind. 609, 255 N.E.2d 919; Jordan v. State (1984) 3d Dist. Ind.App., 466 N.E.2d 734, trans. denied. No unlawful entry having been made, Wickersham is precluded from asserting a right to resist an arrest due to such an entry.

Having no intent to make an arrest, the officers were present in the Wickershams' front yard to protect Barbara. When a police officer "takes it upon himself to enforce the law in order to maintain peace and order for the benefit of the public, the officer is performing official duties as a police officer." Nieto v. State (1986) 2d Dist.



Ind.App., 499 N.E.2d 280, 282. Thus, the officers in the case at issue were lawfully engaged in their duties. Wickersham had good reason to know that these men were officers performing their duties since two of them were in uniform and they were driving patrol cars. Nevertheless, he refused to peacefully converse with Officer Kohne and tried to push his way past the officer. According to Fields v. State, supra, 382 N.E.2d 972, a private citizen may not resist a peaceful arrest by one he knows or has good reason to believe is an authorized police officer performing his duties. Considering the evidence most favorable to the state and all reasonable inferences therefrom, we find sufficient evidence supporting Wickersham's conviction of resisting law enforcement. Because the officers were lawfully present and engaged

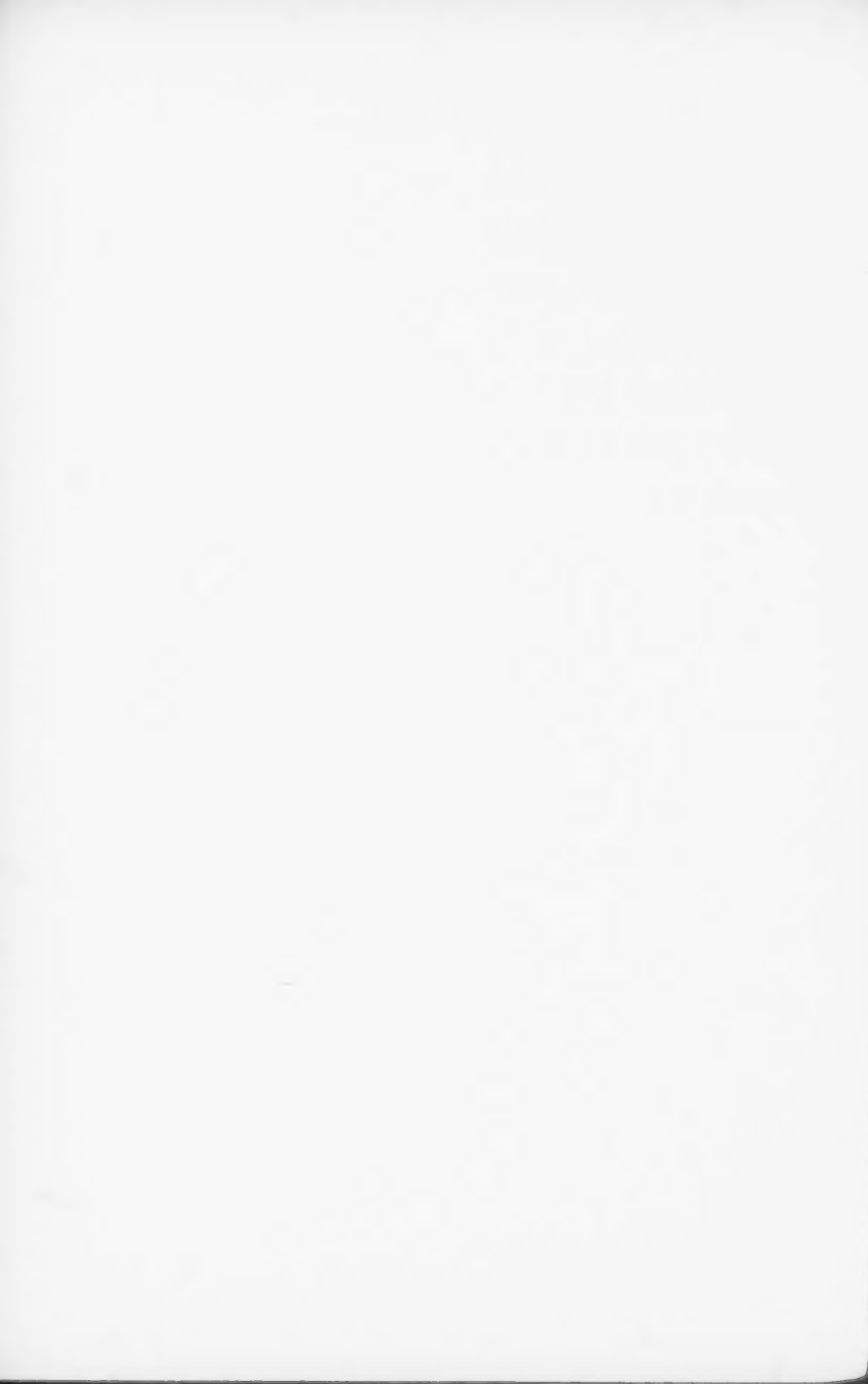


in their duties, evidence of an altercation between the officers and Wickersham was properly admitted.

Wickersham argues that several of the instructions which he tendered were erroneously denied. To determine whether error resulted from the refusal to read an instruction, we must consider:

- (1) Whether the tendered instruction correctly states the law;
- (2) Whether there is evidence in the record which supports the tendered instruction; and
- (3) Whether another instruction covered the substance of the tendered instruction.

Linthicum v. State (1987) Ind., 511 N.E.2d 1026; Pavey v. State (1986) Ind., 498 N.E.2d 1195. The giving of instructions lies largely within the discretion of the trial court. Coonan v. State (1978) 269 Ind. 578, 382 N.E.2d 157, cert. denied, 440 U.S. 984.



The first tendered instruction which Wickersham contends should have been given stated that a warrantless arrest is not peaceful when it is accomplished by forcibly preventing a person from entering his own home. In support of this instruction, Wickersham cites Casselman, supra, 472 N.E.2d 1310. Wickersham's instruction misrepresents the law as stated in Casselman, supra, which involved an officer making an arrest by unlawfully forcing his way into a citizen's home. Casselman is therefore distinguished and not persuasive. In the case before us, the conduct and presence of the officers were lawful. The trial court correctly denied this instruction.

The next instruction, which Wickersham argues was erroneously denied, follows:

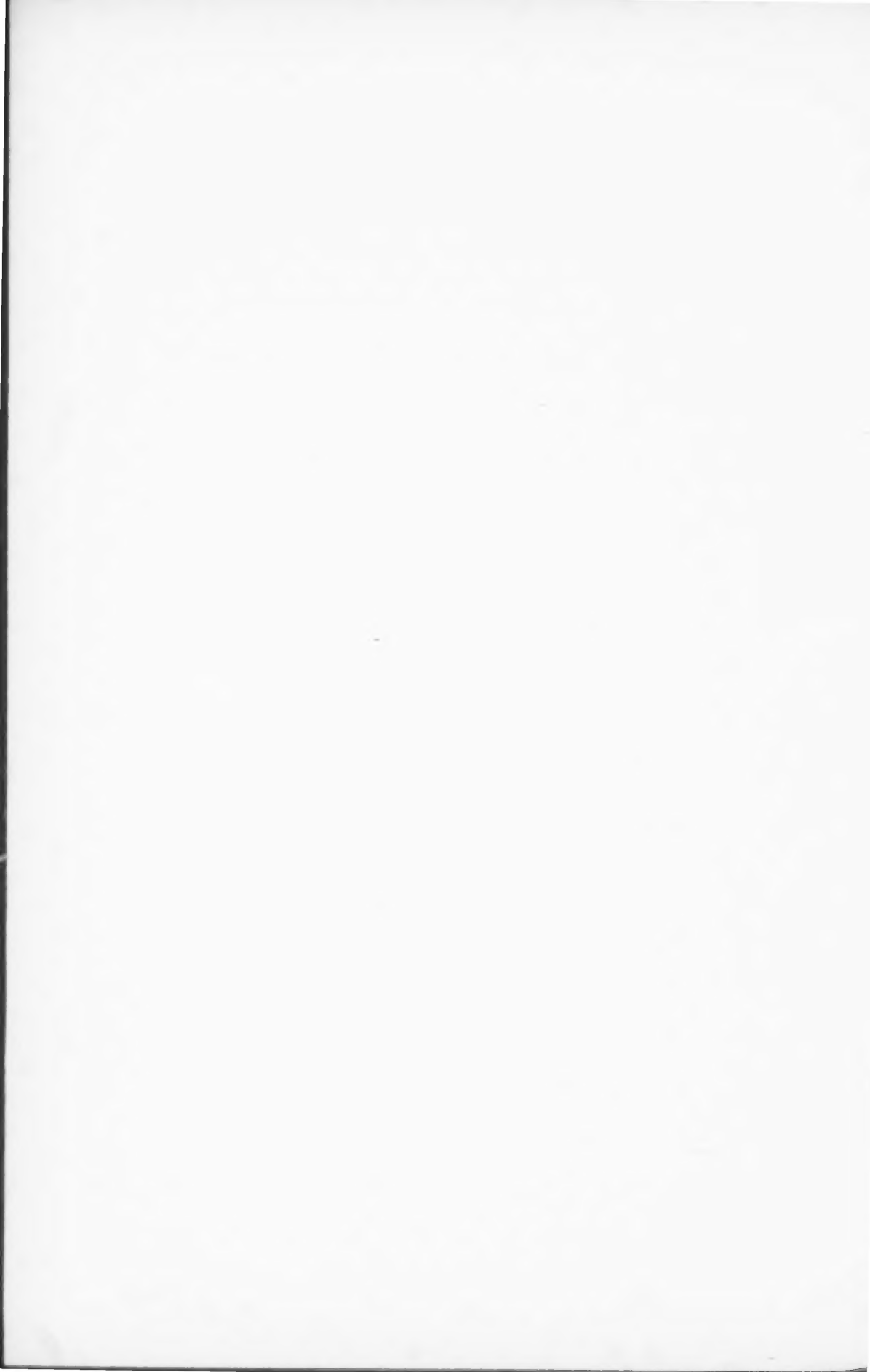
"A warrantless in-home arrest is not lawful without probable cause and exigent circumstances making it



impractical to procure an arrest warrant. Exigent circumstances traditionally are: (1) When suspect is fleeing or likely to flee to escape arrest or (2) evidence is threatened with destruction or (3) in cases of hot pursuit or use of moveable vehicles." Record at 41.

The facts do not support the giving of this instruction because the arrest was not made in the Wickershams' home. The officers did not need a warrant to enter their front yard because Barbara requested that they enter it.

The trial court also refused a tendered instruction which stated that police officers cannot create exigent circumstances to justify warrantless seizures. We find no evidence in the record to support this instruction. None of the officers entered the Wickershams' front yard with the intent to arrest Wickersham. Their intent was to protect Barbara. Real, not created, exigent circumstances existed when Wickersham drove into his driveway and approached the



house which Barbara had re-entered. Fearing for Barbara's safety, Officer Kohne attempted to stop Wickersham. He arrested Wickersham when Wickersham refused to converse and tried to push his way past him. The circumstances justified a seizure. Furthermore, as we have previously stated, the officers were legally present in the Wickershams' yard without a warrant. It was within the trial court's discretion to deny this instruction.

Wickersham tendered two instructions as follows:

"There are circumstances where unlawful warrantless intrusion into the home and premises thereto creates a privilege to resist and punishment of such resistance is improper." Record at 38.

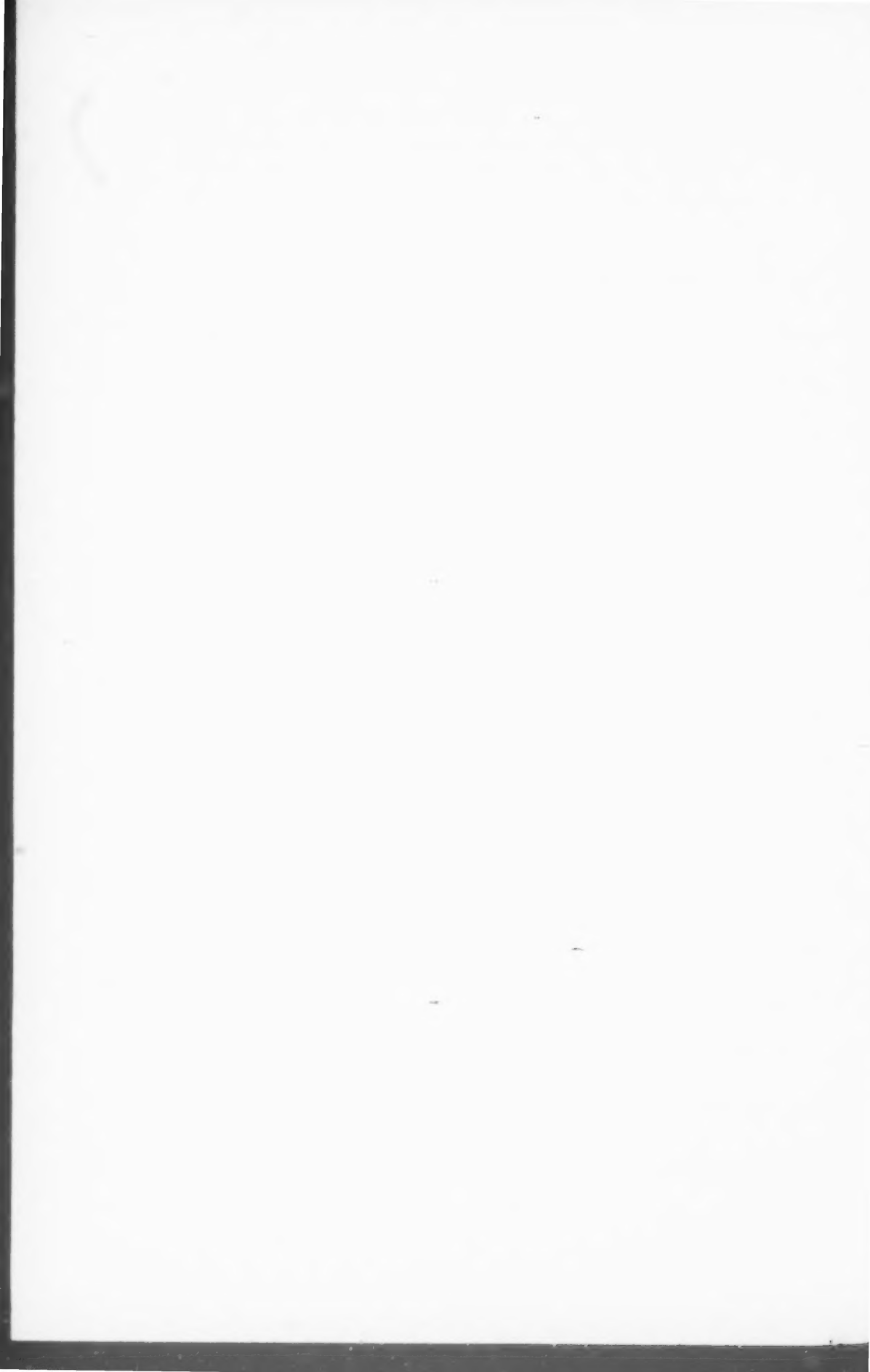
"A conconsensual, [sic] forcible, warrantless entry of police officers into a private residence, in the absence of exigent circumstances, to seize someone who had agruably [sic] committed misdemeanors in a police officer's presence and who had been



initially seized was a violation and deprivation of 4th Amendment to the U.S. Constitution rights. A private residence includes the grounds directly outside of it." Record at 43.

Again, the facts in the record do not support these tendered instructions because the officers entered the Wickershams' yard with Barbara's consent. These instructions were properly denied.

Wickersham argues that a tendered instruction on entrapment was erroneously refused. This instruction correctly states the law as found in I.C. 35-41-3-9 (Burns Code Ed. Repl. 1985). Yet, the instruction was properly excluded because the evidence was insufficient to support such an instruction. To rebut a defense of entrapment, the state must show that the police officer did not initiate or actively participate in the criminal activity or that the defendant was predisposed to commit the crime. Marts v.



State (1982) Ind., 432 N.E.2d 18; Williams v. State (1980) 274 Ind. 94, 409 N.E.2d 571; Cyrus v. State (1978) 269 Ind. 461, 381 N.E.2d 472, cert. denied, 441 U.S. 935; Harrington v. State (1980) 2d Dist. Ind.App., 413 N.E.2d 622, trans. denied. The evidence did not reveal any initial intent of the officers to make an arrest. They were present at Barbara's request. Officer Kohne merely approached and attempted to converse with Wickersham. He did not provoke Wickersham into resisting law enforcement. Thus, the facts do not support the giving of an instruction on entrapment.

Wickersham next contends that it was error not to give an instruction stating that the officers erred by not informing him that he was being placed under arrest. In Pullins v. State (1970) 253 Ind. 644, 649, 256 N.E.2d 553, 556, our Supreme Court stated:

"The obvious purpose of informing a suspect he is under arrest is not to make the arrest legal but to indicate to the person being arrested that his detention is legal, so he will not resist. In Plummer v. State (1893), 135 Ind. 308, 34 N.E. 968, the town marshal, attempting to arrest the defendant without a warrant, failed to inform the defendant of his intention, but simply attacked him. We held that under these circumstances the defendant could exercise his right to defend himself, the same as against any unprovoked attack. Here no force was employed. The reason for informing appellant he was under arrest was not present. We further note that the fact of intent to arrest may be shown by surrounding facts and circumstances. Here a verbal statement of an intent to arrest would have been an idle ceremony."

Wickersham's arrest was legal although he was not informed that he was being placed under arrest until after he himself had initiated a hostile confrontation. Unlike the town marshal in Plummer, supra, Officer Kohne had no initial intent to make an arrest. Only when Wickersham refused to cooperate did he make an arrest. Wickersham was aware that the men

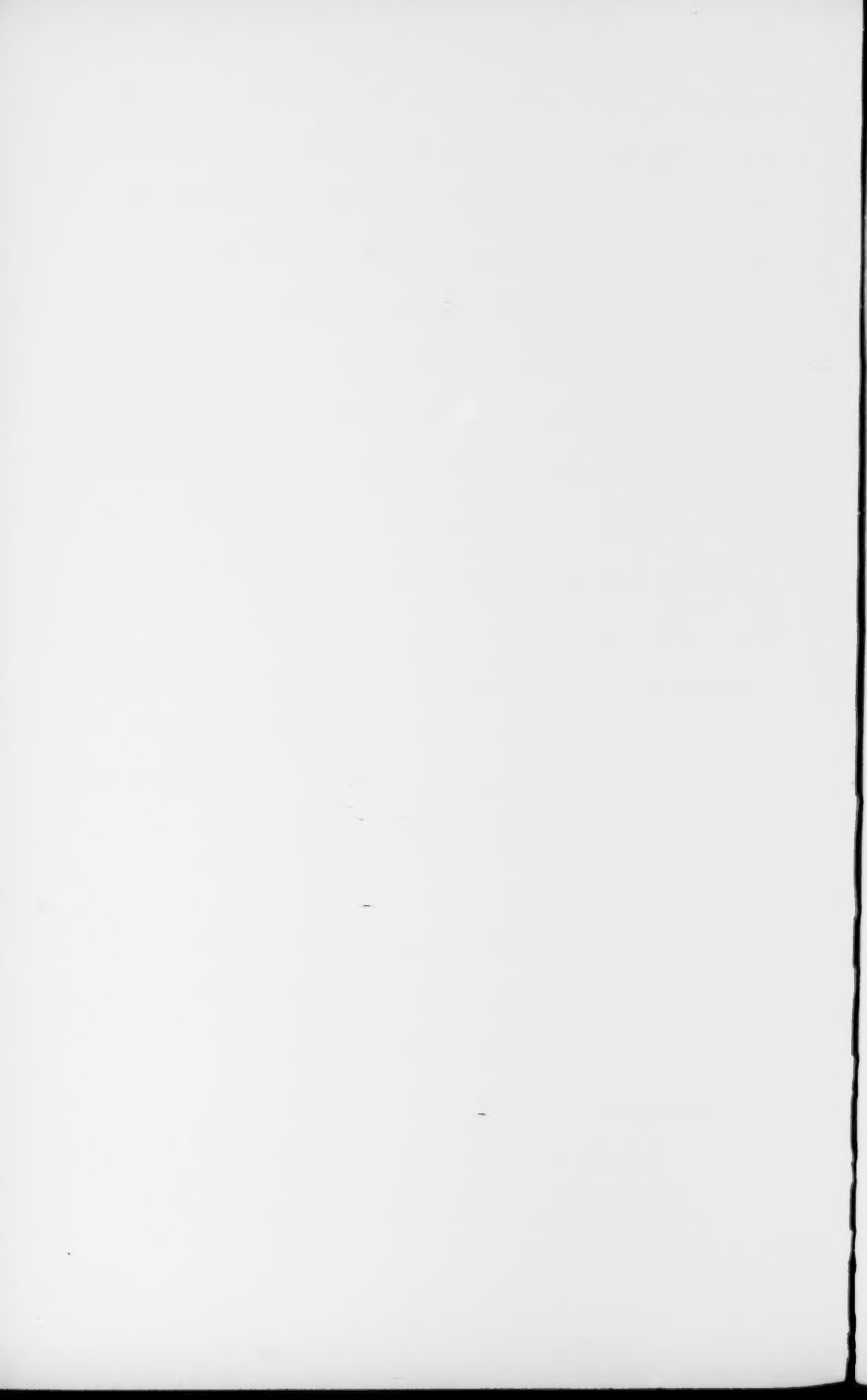
who forced him to the ground and handcuffed him were police officers. It should have been clear to him from the surrounding circumstances that he was not being attacked. Therefore, the arrest was proper without a warning. The tendered instruction was inapplicable and was correctly refused.

Wickersham also contends that the trial court erroneously gave several instructions. He argues that an instruction defining "probable cause" confused the jury by causing them to believe that probable cause, not reasonable doubt, was the standard to be used in the determination of guilt. To find error, the instruction must be "incomplete, obscure, or not accurate so as to mislead or be misunderstood by the jury." Duling v. State (1976) 170 Ind.App. 607, 614, 354 N.E.2d 286, 292. We find that the instruction was a

complete and accurate statement of the law. Taylor v. State (1980) 273 Ind. 558, 406 N.E.2d 247. Defining "probable cause" as used in other final instructions is not obscure. Jury instructions must be considered in reference to each other when determining whether the court erred in its charge to the jury. Hansford v. State (1986) Ind., 490 N.E.2d 1083. Here, the instruction clearly related probable cause to the conduct of the officers in effecting the arrest. It did not purport to advise that a conviction would lie if the jury thought guilt was merely probable. We find no error in the giving of this instruction.

Wickersham also argues that the trial court erred in reading the following instruction on disorderly conduct because disorderly conduct was not charged.

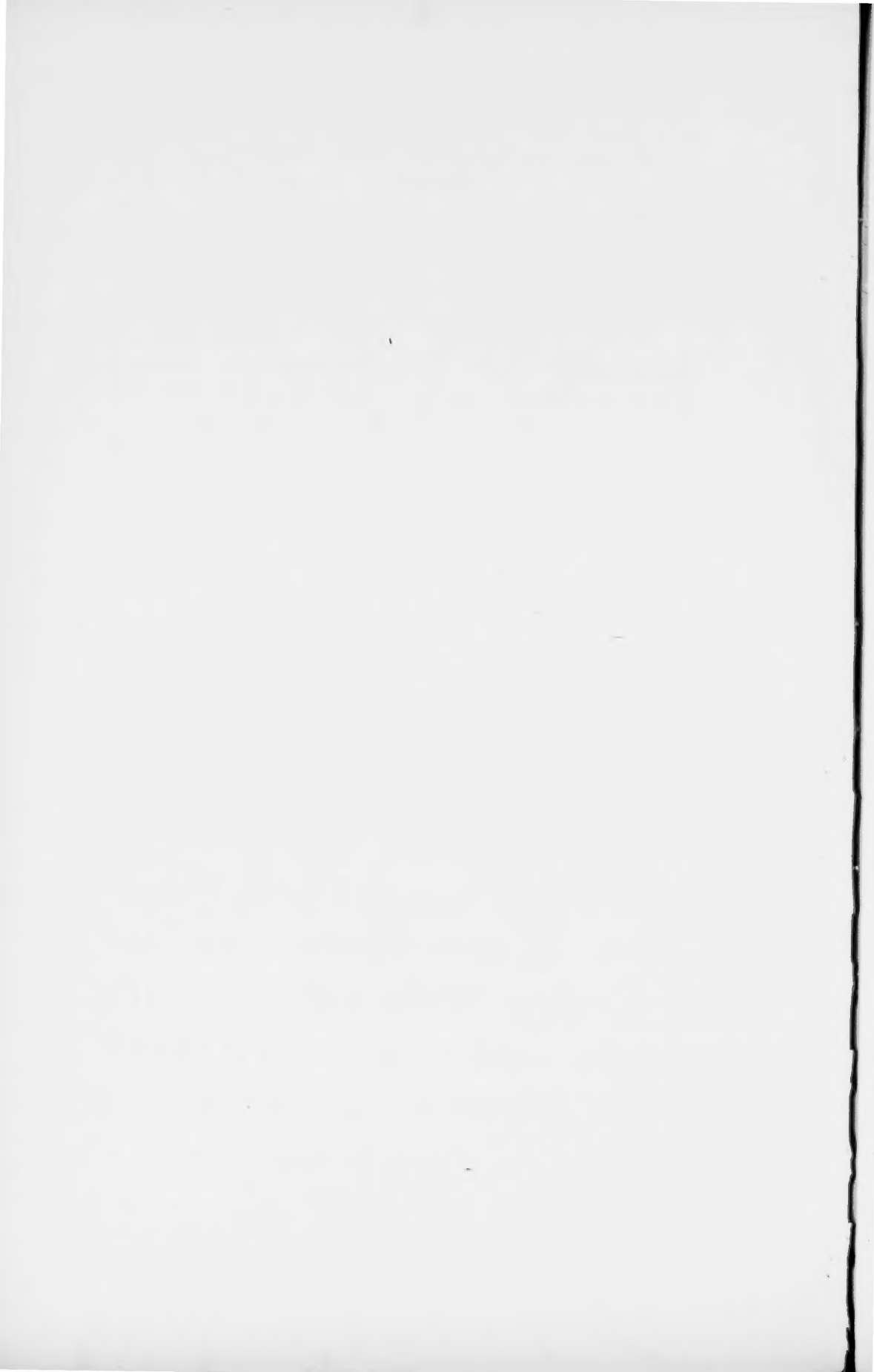
"Based upon the evidence in this case, you may determine whether, at the time of the arrest of the



defendant in this case, the arresting officer had probable cause to believe that the defendant had committed the offense of disorderly conduct in his presence. The portion of the statutory definition of disorderly conduct relevant to this case is as follows:

'A person who recklessly, knowingly or intentionally...makes unreasonable noise and continues to do so after being asked to stop...commits disorderly conduct, a class B misdemeanor.'" Record at 53.

Wickersham has waived this contention by failing to include in his brief the verbatim objection which was overruled. Ind. Rules of Procedure, Appellate Rule 8.3(A)(7). Had this objection been included, we would nevertheless conclude that the instruction, considered in conjunction with the other instructions, was within the trial court's discretion. Tanner v. State (1984) Ind., 471 N.E.2d 665. While making the arrest, Officer Kohne told Wickersham that he was being arrested for disorderly conduct. Thus, it



was appropriate for the jury to consider whether this arrestable offense occurred, justifying the arrest.

Wickersham argues that if the above instruction on disorderly conduct was properly given, then the trial court erred by not including the following:

"Requesting information from a police officer or making a statement to him does not constitute disorderly conduct and any infringement of these rights violates Amendment 1 to the U.S. Constitution." Record at 44.

The trial court's instruction was a correct statement of the law. I.C. 35-45-1-3 (Burns Code Ed. Repl. 1985). We will not find it to be erroneous merely because it was not an all-encompassing statement of the law. Shields v. State (1983) 1st Dist. Ind.App., 456 N.E.2d 1033, trans. denied; Smith v. State (1980) 1st Dist. Ind.App., 403 N.E.2d 869, trans. denied. Furthermore, there was more

evidence of disorderly conduct than merely oral statements made to a police officer. The trial court committed no error in refusing this instruction.

Wickersham contends that it was error for the trial court to give the following instruction:

"You have been instructed as to the standards by which you are to determine whether the arrest of the defendant in this case was proper or improper. If you should determine that the officer lacked probable cause and that the arrest was therefore an unlawful arrest, you must then determine the effect of that unlawfulness on the charge of resisting law enforcement. The law of this State today and on the date of the arrest in question is that a person being unlawfully arrested ordinarily does not have the right to resist the arrest, but must submit. However, if the officer uses unreasonable force, beyond what is necessary to effectuate the arrest and not provoked by any resistance by the person being arrested, then there is the right to resist to the extent necessary to prevent injury." Record at 55.

He argues that this instruction is incomplete in that it does not tell the



jury that there can be times when a forceful and unlawful entry into a citizen's home represents the use of excessive force. As we previously stated, Casselman, supra, 472 N.E.2d 1310, is not persuasive under the facts before us. Here, the officers were lawfully present and did not use excessive force in arresting and restraining Wickersham.

Finally, Wickersham objects to this instruction:

"There was in full force and effect in the State of Indiana at all times relevant to this case a statute concerning the authority of a police officer to make an arrest. That statute reads in part as follows:

A law enforcement officer may arrest a person when the officer has:

(1) a warrant commanding that the person be arrested;

(4) probable cause to believe the person is committing or attempting to commit a misdemeanor in the officer's presence; or



(5) probable cause to believe the person has committed a battery resulting in bodily injury...and that the arrest is necessary to prevent the reoccurrence of a battery...." Record at 51.

He argues that this instruction incorrectly states the law because it does not include the following statement found in the statute:

"The officer may use an affidavit executed by an individual alleged to have direct knowledge of the incident alleging the elements of the offense of battery to establish probable cause." I.C. 35-33-1-1(5) (Burns Code Ed. Supp. 1987).

The giving of instructions is within the trial court's discretion. Coonan, supra, 382 N.E.2d 157. We will not find an abuse of discretion merely because a more complete statement of the law was not given. Shields, supra, 403 N.E.2d 869. The language of the excluded statement is not mandatory but rather permissive, stating but one way in which probable cause may be established for an arrest.



As earlier noted, Wickersham was initially arrested for disorderly conduct in the presence of the officers, not for any preceding battery upon Barbara or any other person nor for any conduct during the earlier domestic disturbance. The charges for resisting law enforcement and for battery were a result of Wickersham's conduct during and after the arrest. Failure to include the language sought did not render the instruction erroneous.

For the foregoing reasons, the judgment is affirmed.

BUCHANAN, J. and MILLER, J., CONCUR.

(DECISION HANDED DOWN JUNE 16, 1988.)



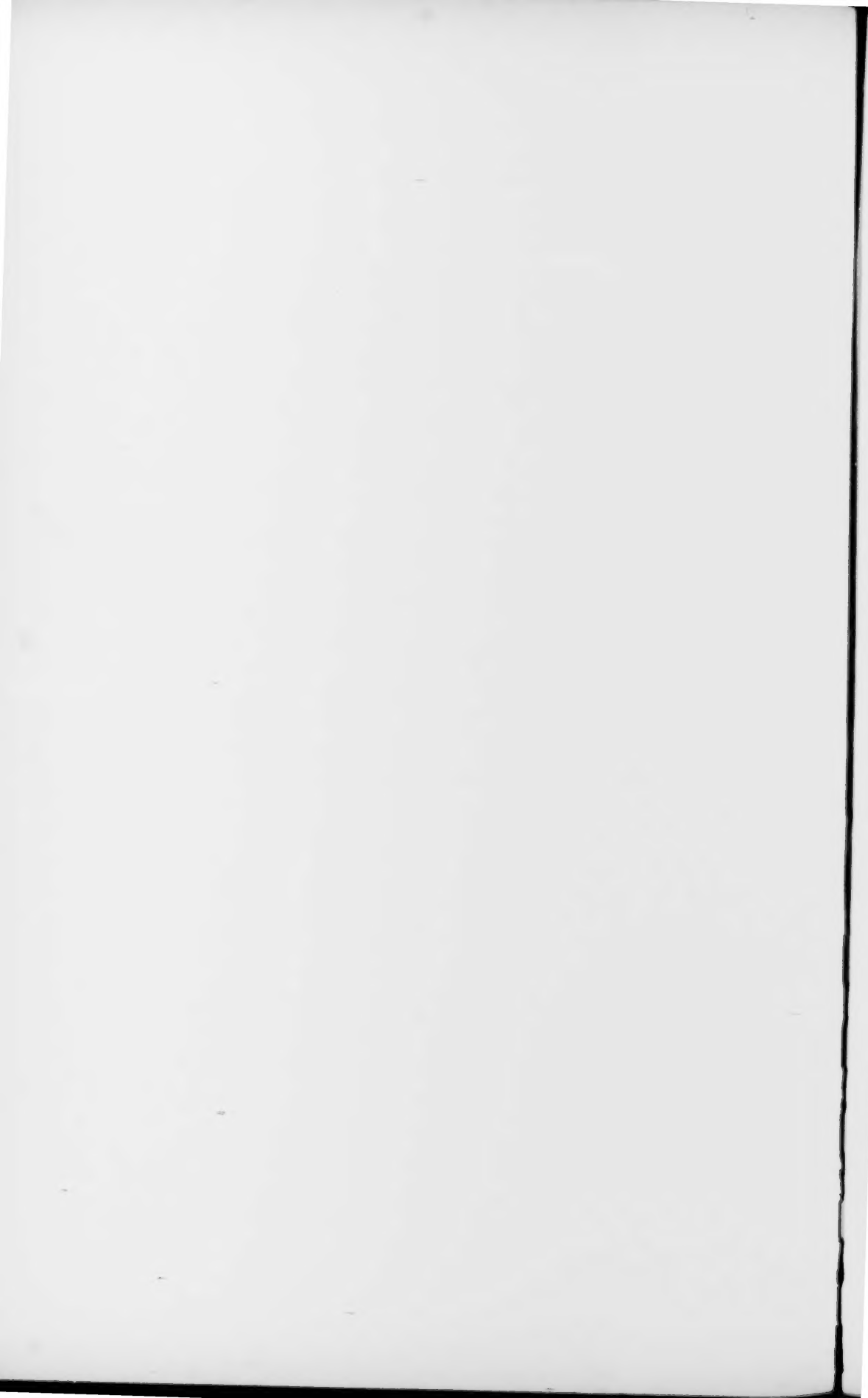
CARROLL CIRCUIT COURT

Date 9/16/86

STATE)	
)	
V.)	No. CS-85-1050
)	
WICKERSHAM)	

The Court will please enter the following minutes: Defendant files Praecipe for Record of Proceedings.

ss/F. A. Briggs
Attorney's Signature
Atty. for Defendant



STATE OF INDIANA
COUNTY OF CARROLL

COUNTY COURT DIVISION
SS: CARROLL CIRCUIT COURT
1986 TERM

STATE OF INDIANA

VS.

CAUSE NO. CS-85-1050

STEVEN WICKERSHAM

PRAECIPE

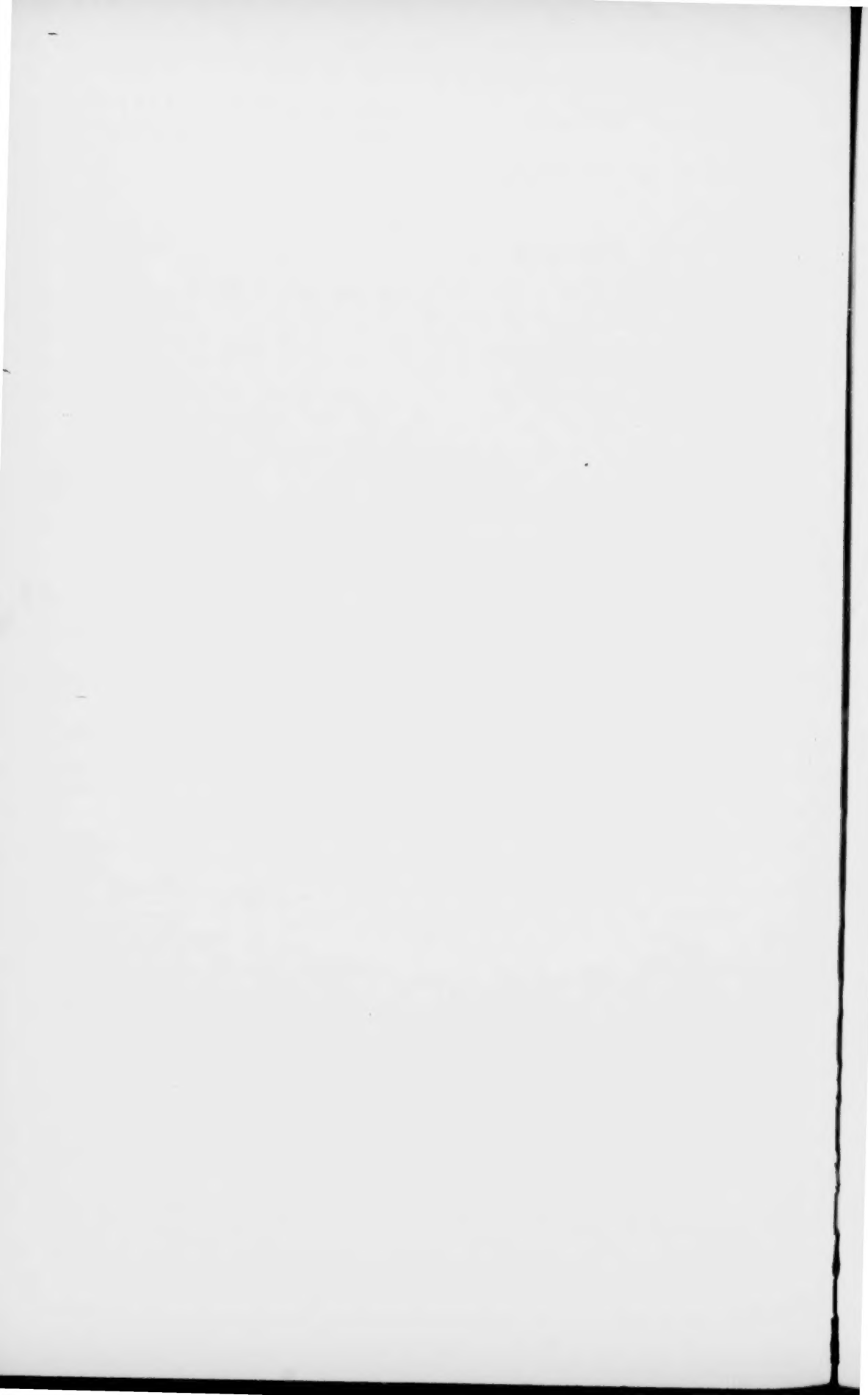
TO: THE CLERK AND COURT REPORTER:

The Clerk and the Court Reporter are hereby requested to prepare a record in the above-captioned cause of action for submission to the Court of Appeals of the following portions of the record and/or testimony in the above captioned cause of action:

(1) The Motion to Correct Errors filed herein and the ruling of the Court on same.

(2) This Praecipe.

(3) The objections made by the defense counsel to the jurors taking notes and to



the jurors taking the notes into the Jury-Room for deliberation; and the motion of defense counsel requiring the notes to be retained in the Court files for use on Appeal; and the rulings of the Court with reference to the Objections and Motion.

(4) The portion of testimony of Steve Kohne beginning with commencement of his testimony and extending through the hearing on the Motion to Suppress and concluding with the ruling on the Motion to Suppress.

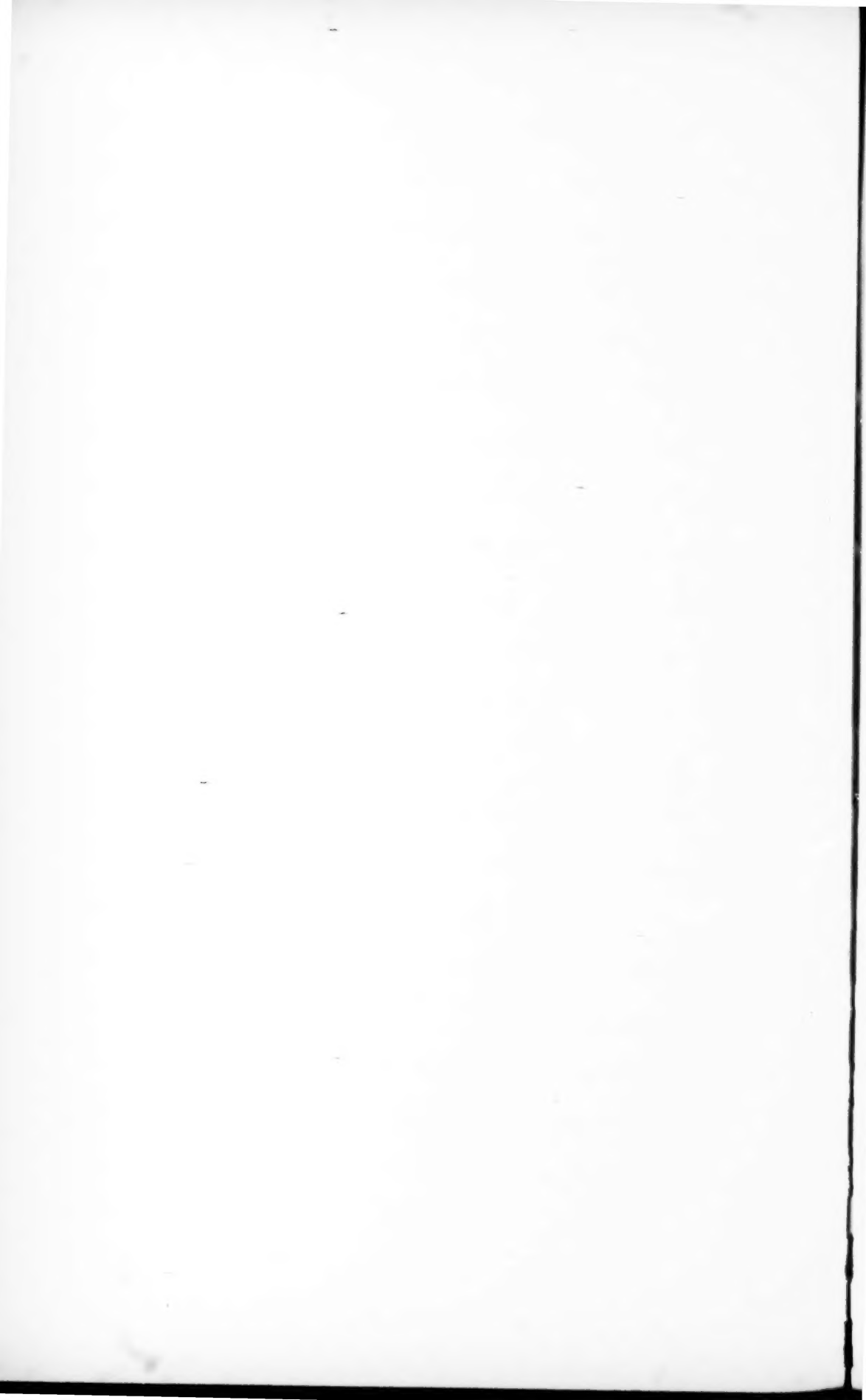
(5) All final instructions given by the Court.

(6) All proposed Final Instructions tendered by Defendant's attorney.

(7) All objections made on the record by Defendant's attorney to the Court's Final Instructions.

(8) The verdict of the jury.

(9) The judgment of the Court on the jury's verdict.



(10) The complete testimony of Shawn Wickersham.

(11) The testimony of Steve Wickersham except for the omitted question to him.

The record must include a certified copy of the Motion to Correct Errors which is required to be inserted at the beginning of the record. The praeciped record must be certified by you. The transcript of the proceedings at the trial including all papers, objections, testimony and other matters referred to the above shall be presented to the trial judge, Honorable Darrell Diamond, Referee, of the County Court Division of the Carroll Circuit Court, and to Honorable Donald R. Myers, Judge of the Carroll Circuit Court, who shall certify same and order same to be filed and made apart of the record. The record must be filed with the Court of Appeals of Indiana within ninety (90) days from the date of the ruling on the

Motion to Correct Errors. The ruling on the Motion to Correct Errors was August 18, 1986. Ninety days from that date is November 16, 1986, and that being a Sunday the record is due to the Court of Appeals on November 17, 1986.

ss/Florence Anne Briggs
Attorney for
Steve Wickersham
P.O. Box 2
Flora, IN 46929
(219) 967-3631/3643

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the above Praecipe to the Prosecutor's office, Carroll County, Indiana, Courthouse, Delphi, IN 46923, on the 16th day of September 1986.

ss/Florence Anne Briggs

*Pursuant to Rule 2(a) of the Indiana Rules of Appellate Procedure a Praecipe constitutes the commencement of an appeal. There is no notice of appeal other than the Praecipe.

STATE OF INDIANA
COUNTY OF CARROLL

SS: COUNTY COURT DIVISION
IN THE CARROLL
CIRCUIT COURT
1985 TERM

STATE OF INDIANA

VS.

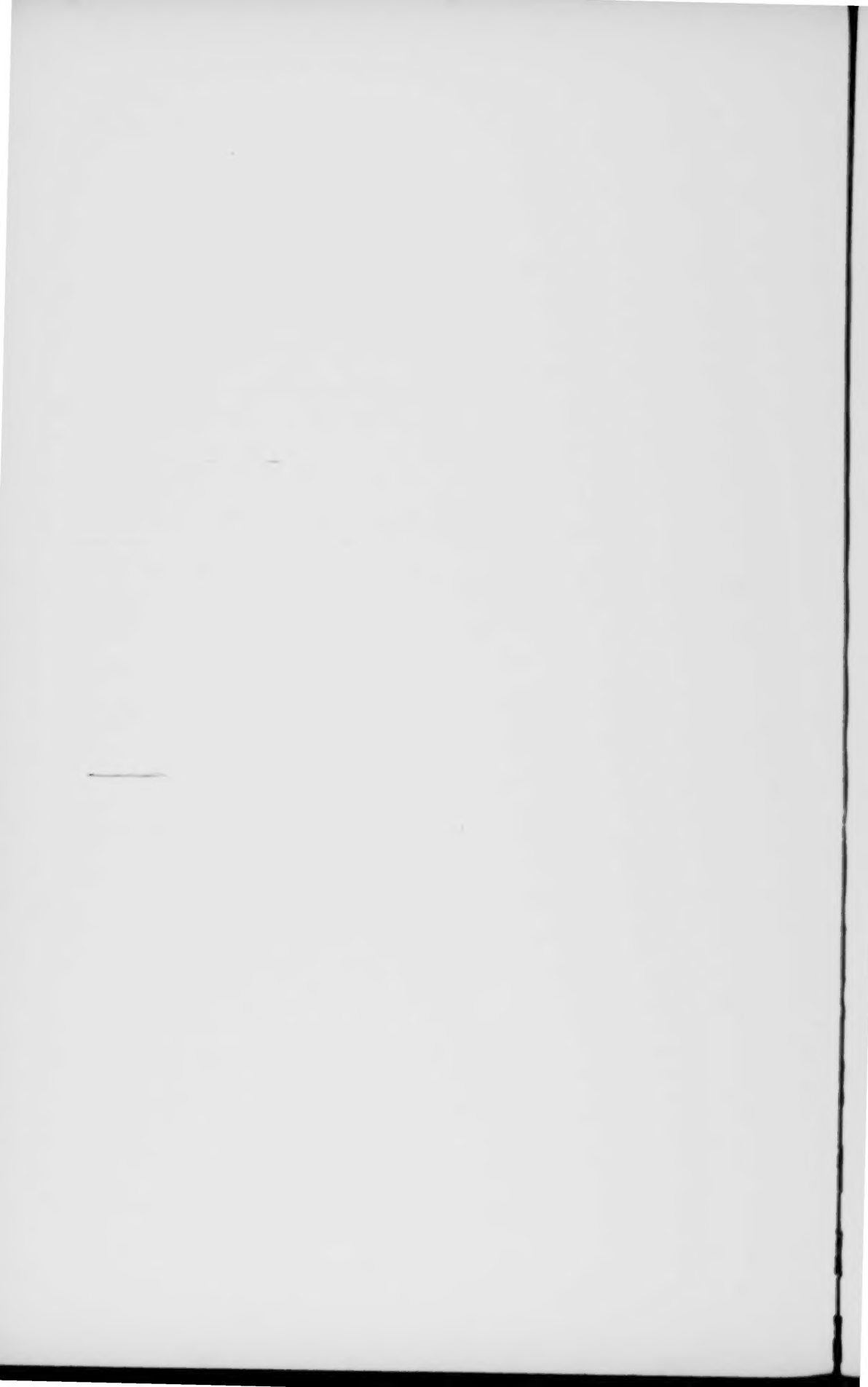
CAUSE NO. CS-85

STEVEN WICKERSHAM

INFORMATION:
COUNT I: BATTERY

The undersigned, being duly sworn,
upon his oath says that: On or about the
15th day of September, 1985, in Carroll
County, in the State of Indiana, Steven
Wickersham, did knowingly touch J. Steven
Kohne, a law enforcement officer, to-wit:
a Carroll County Deputy Sheriff, in a rude,
insolent and angry manner, to-wit: by using
his fist and striking J. Steven Kohne in the
face,

All of which is contrary to the
form of the statute in such cases made and



provided, to-wit: I.C. 35-42-2-1, a Class A misdemeanor and against the peace and dignity of the State of Indiana.

ss/J. Steven Kohne

Subscribed and sworn to by said affiant this 16th day of September, 1985.

My commission ss/Rose Mary Lybrook
expires: Rose Mary Lybrook, Notary
November 20, 1987 Public

APPROVED:

My term expires:
December 31, 1986 ss/Jeffrey R. Smith
Jeffrey R. Smith
Prosecuting Attorney

Bench Warrant to issue
bond is set at
\$ _____.

WITNESSES FOR STATE:

J. Steve Kohne
Don Kessler, Rossville
Dan Bluemke

Barbara Wickersham ss/Darrel K. Diamond
Judge, County Court
Division

STATE OF INDIANA
COUNTY OF CARROLL

SS: COUNTY COURT DIVISION
IN THE CARROLL
CIRCUIT COURT
1985 TERM

STATE OF INDIANA

VS.

CAUSE NO. CS-85-

STEVEN WICKERSHAM

INFORMATION:
COUNT II: RESISTING
LAW ENFORCEMENT

The undersigned, being duly sworn, upon his oath says that: On or about the 15th day of September, 1985, in Carroll County, in the State of Indiana, Steven Wickersham, did knowingly and forcibly resist a law enforcement officer, to-wit: J. Steven Kohne, a Carroll County Deputy Sheriff while J. Steven Kohne was lawfully engaged in his duties as a law enforcement officer,

All of which is contrary to the form of the statute in such cases made and



provided, to-wit: I.C. 35-44-3-3 (1), a
Class A misdemeanor and against the peace
and dignity of the State of Indiana.

ss/J. Steven Kohne

Subscribed and sworn to by said affiant this
16th day of September, 1985.

My commission
expires:

November 20, 1987

ss/Rose Mary Lybrook
Rose Mary Lybrook, Notary
Public

APPROVED:

My term expires:

December 31, 1986

ss/Jeffrey R. Smith
Jeffrey R. Smith
Prosecuting Attorney

WITNESSES FOR
STATE:

J. Steven Kohne
Don Kessler, Rossville
Dan Bluemke
Barbara Wickersham

Bench Warrant to issue
bond is set at \$_____.

ss/Darrel K. Diamond
Judge, County Court
Division

STATE OF INDIANA
COUNTY OF CARROLL

SS: IN THE COUNTY COURT
DIVISION
CARROLL CIRCUIT COURT

1986 TERM

STATE OF INDIANA

VS.

CAUSE NUMBER CS-85-1050

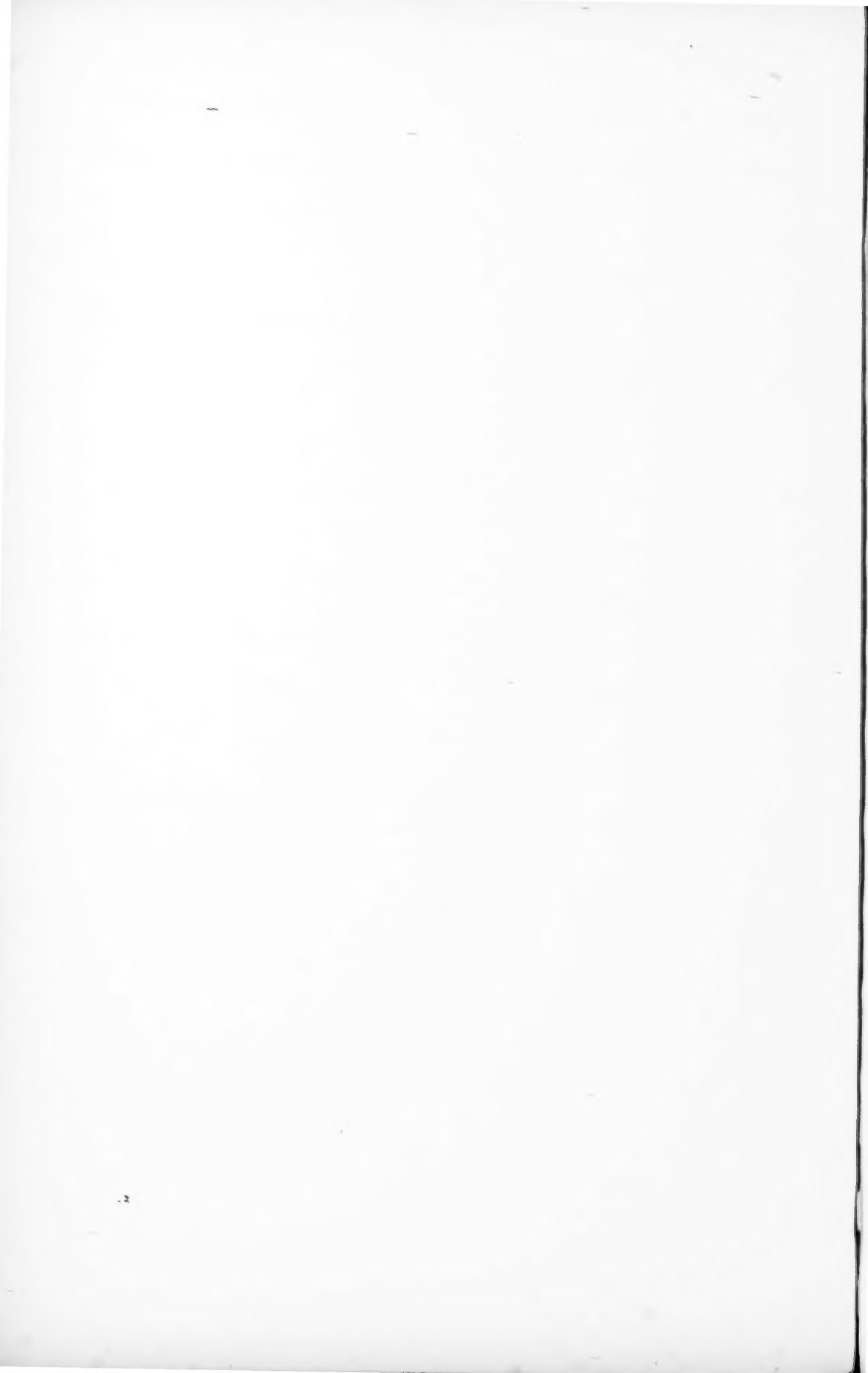
STEVEN WICKERSHAM

VERDICT

We the Jury find the defendant
Steven Wickersham not guilty of battery.

Dated this 29th day of May, 1986.

ss/Donald W. Stoner
Foreman



STATE OF INDIANA
COUNTY OF CARROLL

IN THE COUNTY COURT
SS: DIVISION
CARROLL CIRCUIT COURT

1986 TERM

STATE OF INDIANA

VS.

CAUSE NUMBER CS-85-1050

STEVEN WICKERSHAM

VERDICT

We the Jury find the defendant
Steven Wickersham guilty of resisting law
enforcement, a class A misdemeanor, as
charged in Count II of the Information.

Dated this 29th day of May, 1986.

ss/ Donald W. Stoner
Foreman



) COUNTY COURT DIVISION
) SS: OF CARROLL CIRCUIT
) CCURT

COUNTY COURT DIVISION
OF CARROLL CIRCUIT
CCURT

1986 TERM

STATE OF INDIANA

VS

CAUSE NUMBER CS-85-1050

STEVEN WICKERSHAM

SENTENCING ORDER AND JUDGMENT

State of Indiana appears by James R. Huffer, Deputy Prosecuting Attorney. Defendant appears in person and by counsel, Florence Anne Briggs. Sentencing hearing is held. The Presentence Investigation Report is considered. Defendant makes certain objections and corrections, which are noted. Argument is made by counsel. Evidence and statement by Defendant are waived.

The Court finds both mitigating and aggravating circumstances. In mitigation, the Court notes the Defendant's lack of any prior criminal history, his

unusually good work record and reasonable position, his generally stable life style and that there was a degree of provocation or emotional stress because of his wife's actions culminating in the marital dispute from which the situation arose.

In aggravation, the Court notes that Defendant during the trial exhibited an extremely assertive and egocentric personality. Defendant considers his own desires to be his only standard and will conform to the law and the expectation of society only so long as it suits his fancy to do so. The Court has a strong impression that Defendant's testimony at trial was deliberately falsified. Further, the testimony of Defendant's 13 year old son was clearly falsified and based upon a script written by someone other than the boy. Defendant must bear some if not all of the responsibility for this. The Court also finds that the facts of the case and the



force and violence used by Defendant against the officers is such that some incarceration is required and the absence of some imprisonment would depreciate the seriousness of the crime.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant, Steven Wickersham, is 41 years of age and that he is guilty of the offense of resisting law enforcement, a class A misdemeanor, as charged in Count II of the Information. It is further ordered adjudged and decreed that the defendant -is not guilty of battery, as charged in Count I.

Defendant is sentenced to the Carroll County Jail for a period of 90 days which is suspended except for eight days to be served as a term of probation. Defendant has served one day of such sentence and shall be given credit therefor, with good time, as to the 90 day sentence but not as to the eight days served as a term of



probation. Defendant is placed on unsupervised probation for a period of one year, under the following terms: (1) Defendant shall commit no further criminal offenses; (2) Defendant shall serve four consecutive weekends in the Carroll County Jail, from 7 p.m. on Friday to 7 p.m. on Sunday, beginning July 11, 1986. While in jail he will follow the jail rules and obey all lawful orders of the jail staff. The Court imposes a fine of \$200.00 and assessed court costs in the amount of \$61.00. Ten days are allowed for payment.

Court advises Defendant of his appeal rights and of the requirement of filing a motion to correct errors within 60 days. After consideration and consultation with his attorney Defendant returns and announces his intention to appeal. Defendant requests the setting of an appeal. Defendant requests the setting of an appeal.



bond, which is set at \$2,000.00. The cash bail previously posted is released.

So ordered this 19th day of June,
1986.

ss/Darrel K. Diamond
Darrel K. Diamond, Judge
County Court Division
Carroll Circuit Court and
Judge Pro Tem Carroll
Circuit Court